84-1857

Office - Supreme Court, U.S.
FILED
MAY 28 1985
ALEXANDER L. STEVAS,
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GERALD WILLIAM LUCKER, GILLIAN C. LUCKER, HARRY A. LUCKER, JR., LUCY A. LUCKER, AND WILLIAM J. LUCKER

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HOWARD B. SILBERBERG
SILBERBERG & ROSENBERG
Suite 202
1489 Chain Bridge Road
McLean, VA 22101
(703) 821-1800
Attorney for Petitioners

SHELDON I. COHEN
SHELDON I. COHEN & ASSOC.
Suite 708
2009 N. 14th Street
Arlington, VA 22201
(703) 522-1200
Attorney for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

179pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the United States liable to pay just compensation under the Fifth Amendment to the U.S. Constitution, if the President, in normalizing relations with a foreign government, settles and extinguishes the claims of U.S. Nationals, without their consent, against the foreign government for less than the full value of the claims?

2. Is the determination of the value of a foreign claim by the U.S. Foreign Claims Settlement Commission binding on the U.S. Claims Court, where an Act of Congress provides that determinations by the Commission shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other

official, department, agency or establishment of the United States, or by any Court by Mandamus or otherwise?[1]

---

1. The parties below are reflected in the caption of the case in this Court.

TABLE OF CONTENTS

	Page
OPINIONS BELOW.....	1
JURISIDICTION.....	2
CONSTITUTIONAL PROVISIONS, EXECUTIVE AGREEMENT AND STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	13
The Decision Below Deals With An Important Question Which Was Expressly Reserved In A Prior Decision Of This Court - Whether Just Compensation Must Be Paid For Foreign Claims Settled And Extinguished By The President For Less Than Full Value.....	13
The Decision Involves A Novel, Unsettled Important Constitutional Issue Of Major Significance, Unresolved Since The Founding Days Of This Nation.....	21
The Lower Courts Have Ignored A Clear And Convincing Congressional Preclusion Of Judicial Review Of The Decisions Of The Foreign Claims Settlement Commission.	31

The Decision Below Disregards The Principle That The Fifth Amendment Guarantee Against Public Taking Without Just Compensation Is Co-Extensive With The President's Power To Conduct Foreign Affairs... 41

The Issue Involves Numerous Pending Cases With Enormous Amounts Of Money In Dispute.. 49

CONCLUSION..... 53

APPENDIX

-- Agreement Between The Government Of The United States Of America And The Government Of The People's Republic Of China Concerning The Settlement Of Claims..... A-1

-- Decision And Opinion Of The Court Of Appeals, Lucker v. the United States..... A-8

-- Order Of The Claims Court, Lucker v. the United States.... A-10

-- Complaint Filed In Claims Court, Lucker v. the United States..... A-12

-- Decision And Opinion Of The Court Of Appeals, Shanghai Power Co. v. the United States. A-28

-- Opinion Of The Claims Court, Shanghai Power Co. v. the United States..... A-32

-- Letter From Chairman, Foreign Claims Settlement Commission To Senator Sam Nunn, Oct. 29, 1979..... A-92

-- FCSC Publicity And Notice Of The [China Claims] Program..... A-98

-- Foreign Claims Settlement Commission, Summary Of The China Claims Program..... A-105

TABLE OF AUTHORITIES

Page

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)..... 32

Agins v. City of Tiburon, 447 U.S. 225 (1980)..... 17

American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981)..... 31

Armstrong v. United States, 364 U.S. 40 (1960)..... 17,41

Block v. Community Nutrition Institute, 467 U.S. ___, 104 S.Ct. 2450, 81 L.Ed 2d 270 (1984)..... 32

Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, 651 F.2d 800 (1st Cir. 1981)..... 14,31

Cities Service Co. v. McGrath, 342 U.S. 330 (1952)..... 25,26

Comegys v. Vasse, 26 U.S. (1 Pet.) 193 (1828)..... 24,25

Dames & Moore v. Regan, 453 U.S. 654 (1981)..... 13,16,17,18 21,41,52,53

Dismuke v. United States, 297 U.S. 172..... 32

Doe v. Braden, 57 U.S. (16 How.) 635 (1853)..... 42

Dunlop v. Bachowski, 421 U.S. 560 (1975)..... 32

E-Systems, Inc. v. United States, 2 Cl. Ct. 271 (1983)..... 31,51

First Nat. City Bank v. Gillelland, 257 F.2d 223, cert. denied, 358 U.S. 837 (1958)..... 40

Geofroy v. Riggs, 133 U.S. 258 (1890)..... 42

Gray v. United States, 21 Ct. Cl. 340 (1886)..... 28,29-30

Hadacheck v. Sebastian, 239 U.S. 394 (1915)..... 48

Hidalgo County Water Control & Improvement Dist. v. Hedrick, 226 F.2d 1 (5th Cir. 1955)..... 31

Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872)..... 42

Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982)..... 43

Langenegger v. United States, 5 Cl. Ct. 229 (1984)..... 20

Langenegger v. United States, 757 F. 2d 1565 (Fed. Cir. 1985)..... 20A

Lindahl v. Office of Personnel Management, ___U.S.___, 105 S.Ct. 1620, 84 L.Ed 2d 674, ___, (1985). 31-32

Meade v. United States, 2 Ct. Cl. 224 (1866), aff'd on other grounds, 76 U.S. (9 Wall.) 691 (1869)..... 27,28

Penn Central Transp. Co. v. N.Y. City, 438 U.S. 104 (1978).... 45,48

Prout v. Starr, 188 U.S. 537 (1903)..... 42

Ramirez v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), cert. granted, No. 84-1389, May 20, 1985..... 51-52

Ried v. Covert, 354 U.S. 1, (1956)..... 42

Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983). 1,11,12,13 19,20A,21 30,33,44,47

Shanghai Power Co. v. United States, No. 84-860, Fed. Cir., Feb. 13, 1985..... 1,19,48

The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870)..... 42

United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)... 42

United States v. Minnesota, 270 U.S. 181 (1926)..... 42

United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)..... 23,24

Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)..... 21,22,23

Witner v. United States, 357 U.S. 349 (1958)..... 38

Constitutional Provisions, Treaties, Executive Agreement, Statutes and Regulations

Fifth Amend. U.S. Const.....2,13,15,17 18,19,24,26 29,31,41,52

Arbitration Treaty between the United States and China, June 27, 1930, 140 League of Nations Treaty Series 184 (1933)..... 44

Treaty of Peace Amity and Commerce between China and the United States, July 3, 1844, 97 Consolidated Treaty Series 105 (1969)..... 43-44

Treaty Regulating Tariff Relations between United States and China, July 25, 1928, 107 League of Nations Treaty Series 125 (1930).. 44

Treaty of Trade, Consels and Emigration between China and the United States, July 28, 1868, 137 Consolidated Treaty Series 467 (1976)..... 44

Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, May 11, 1979..... 2,10

Title V, International Claims Settlement Act of 1949 as amended.....7,30,31,33

Tucker Act, 28 U.S.C. 1491..... 5,15

Tucker Act, Ch. 359, 24 Stat. 505, Mar. 3, 1887..... 24,29

Ch. 25, 23 Stat. 283..... 29

Ch. 54, Sec. 7(e), 64 Stat. 17, 22 U.S.C. 1626(e)..... 34

Ch. 54, 64 Stat. 16, 22 U.S.C. 1623(h)..... 32

P.L. 81-455, 64 Stat. 12, Mar. 10, 1950..... 33

P.L. 88-666, 78 Stat. 1112, 22 U.S.C. 1643h..... 32

Sec. 509, P.L. 88-666, 78 Stat. 1112..... 23

P.L. 89-780, 80 Stat. 1365, Nov. 6, 1966..... 33

18 U.S.C. 1001..... 37

22 U.S.C. 1623(b)..... 36

22 U.S.C. 1623(b), (c), (d), (e), (h), (j)..... 34

22 U.S.C. 1623(c), (d)..... 37

22 U.S.C. 1623(e)..... 37

22 U.S.C. 1623(h)..... 3,32,37

22 U.S.C. 1626(e)..... 36,39

22 U.S.C. 1626(f)..... 34

22 U.S.C. 1642o..... 35-36,40

22 U.S.C. 1643-1643k..... 7,33

22 U.S.C. 1643f..... 41

22 U.S.C. 1643h.....3,32,34,35 36,37,40

28 U.S.C. 1254(1)..... 2

45 C.F.R. 501, 531..... 37

45 C.F.R. 531.6(c)..... 39

45 C.F.R. 531.6(d)..... 39

Other Authorities

1981 FCSC Annual Report..... 10

Catalogue of Treaties, 1814-1918, U.S. Department of State (1919)... 43

Coerper, The Foreign Claims Settlement Commission and Judicial Review, 50 Am. J. Int. L. 868 (1956)..... 40

FCSC Claim No. CN-0566, Dec. No. CN-500..... 8

FCSC Claim No. CN-0555, Dec. No. CN-506..... 8

FCSC Summary of the China Claims Program, June 4, 1979..... 9,49

33 Fed. Reg. No. 4, Jan. 6, 1968.. 36

H.R. Rep. No. 2233, 89th Cong. 2d Sess., Sept. 6, 1966..... 35

Letter Chairman, FCSC, to Sen. Sam Nunn, Oct. 29, 1979..... 11

L. Henkin, Foreign Affairs and the Constitution, 1972..... 23

Re, The Foreign Claims Settlement Commission, Its Functions and Jurisdiction, 60 Mich. L. Rev. 1079 (1962)..... 39,40

S. Rep. No. 800, 81st Cong., 2d Sess., July 28, 1949..... 34

S. Rep. No. 1521, 88th Cong., 2d Sess., Sept. 8, 1964..... 35

The United States Court of Claims - A History, 1855-1978, 216 Court of Claims Reports 39..... 29

OPINIONS BELOW

The unpublished opinion of the Court of Appeals of February 28, 1985 appears in the Appendix. This affirms an unpublished judgment and order of the United States Claims Court of December 30, 1983 which also appears in the Appendix.

The opinions in the instant case are based on the opinion of the Claims Court in Shanghai Power Company v. United States, 4 Cl. Ct. 237 (1983). This opinion, as well as the unpublished opinion of the Court of Appeals affirming the Claims Court in Shanghai Power Co. v. United States, No. 84-860, decided Feb. 13, 1985, also appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on February 28, 1985. This petition for certiorari was filed within ninety days from that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, EXECUTIVE AGREEMENT AND STATUTES INVOLVED

The Fifth Amendment to the U.S. Constitution: Just Compensation for Property.

> . . . nor shall private property be taken for public use, without just compensation.

Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, May 11, 1979.

(The full text of the Agreement is reproduced in the appendix at pages A1 through A7).

22 U.S.C. §1643h. [Claims Against Cuba and China] Applicability of administrative provisions of subchapter I.

> To the extent they are not inconsistent with the provisions of this subchapter, the following provisions of subchapter I of this chapter shall be applicable to this subchapter: Subsections (b), (c), (d), (e), (h), and (j) of section 1623 of this title; subsection (f) of section 1626 of this title.

22 U.S.C. §1623(h). Notification of disposition of claims; right to hearing; finality of Commission's decision.

> The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be

entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to such claim. The action of the Commission in allowing or denying any claim under this subchapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise.

STATEMENT OF THE CASE

This petition for certiorari is from a final judgment of the United States Court of Appeals for the Federal Circuit affirming a decision of the United States Claims Court dismissing petitioners' complaint[1]. Jurisdiction

---

1. Since the Claims Court never

of the Claims Court was founded on 28 U.S.C. §1491. In that complaint petitioners alleged that they, and all other members of a class similarly situated, had had their property taken without just compensation by the United States. Petitioners' and all other class members' property consisted of claims against the People's Republic of China (PRC) which resulted from their property having been confiscated following the Communist takeover in 1949. These claims were ultimately adjudicated and certified by the Foreign Claims Settlement Commission of the United States (FCSC). The taking without just compensation occurred as a result of the United States, without the

---

(footnote continued from previous page)
adjudicated the facts, the facts alleged in petitioners' Complaint, (App. A12-A27, must be taken as true in reviewing a dismissal on the pleadings.

request or consent of petitioners or the other class members, entering into an agreement with the PRC settling all claims of the United States and its nationals against the PRC for less than the value of the claims as determined by the FCSC.

Petitioners are the heirs and successors-in-interest of two American citizens and an American corporation which owned substantial real and personal property in China prior to 1949. They are representatives of a class of persons similarly situated. The named petitioners are the heirs of Harry A. Lucker and Gerald D. Lucker who were citizens of the United States, and who owned certain property in Tientsin, China when the PRC took power in China. Their property consisted of stock of an American corporation, the American

Chinese Company Federal, Inc., USA, and a parcel of real estate on which stood a furnished, three-story residence and an adjoining garage. The corporation, in turn, owned and operated an automobile dealership in Tientsin, and also owned real estate in that city consisting of a three-story commercial building covering half a city block.

Petitioners' property, like that of many other persons, was confiscated by the PRC after it took power in 1949. As a result of those confiscations, the FCSC was authorized by Congress to receive the claims of American nationals, to adjudicate those claims and to determine the amount of the losses suffered by those nationals.[2] The FCSC on June 30, 1970 issued two

---

2. Title V, International Claims Settlement Act of 1949 as amended, 22 U.S.C. §§1643-1643k.

Certifications of Loss on behalf of the petitioners' predecessors-in-interest certifying, in one claim, that they suffered a loss of $70,000 plus interest at 6 percent per annum from December 22, 1950 for the seizure of certain real and personal property in Tientsin, China,[3] and certifying a second loss of $50,000 plus interest at six percent per annum from December 31, 1950 for the loss of certain other property in Tientsin, China.[4] The value of petitioners' claims against the PRC, as of May 11, 1979, including six

---

3. FCSC Claim No. CN-0566, Decision No. CN-500.

4. Claim No. CN-0555, Decision No. CN-506. Petitioners were subsequently certified as the substitute beneficiaries and the parties in interest by the FCSC on September 19, 1979, in Claim No. CN-0556, and by the U.S. Department of the Treasury on November 19, 1980 in Claim No. CN-0555.

percent interest amounted to $153,000 if calculated with simple interest, or $469,722 if calculated with compounded interest.[5]

The FCSC, in addition to certifying the losses to petitioners, certified 376 losses in the total amount of $196,861,841 plus interest at 6 percent per annum to date of payment[6] to claimants whose property ws confiscated by the PRC. Three additional losses were later certified as a result of a second China Claims program covering

---

5. The amount of the certified losses has been reduced by one-fourth because one of the parties in interest, Josephine M. Lucker, who holds a 25 percent interest, has not joined as a party to this suit at this time.

6. FCSC Summary of the China Claims Program, June 4, 1979. (App. A105).

Nov. 6, 1966 to May 11, 1979, for additional certifications in the principal amount of $176,455.[7]

On May 11, 1979 the President of the United States and the PRC entered into an agreement to settle all of the claims of the U.S.A. and its nationals against the PRC arising from any nationalization, expropriation, intervention, or other taking of property after October 1, 1949 and prior to the date of the agreement.[8] It was agreed that the PRC would pay the sum of $80.5 million in full and final settlement of the claims of the U.S. and its nationals. This amount was about 41 percent of the value of the losses originally certified by the FCSC, not including accrued interest. Under the

---

7. 1981 FCSC Annual Report, 19.

8. Agreement between the U.S.A. and the PRC, May 11, 1979 (App. A1-A7).

agreement, payments were to be made in six installments, the last installment being due on October 1, 1984. The United States, through the Department of the Treasury, distributed these funds pro-rata to those claimants who had been issued Certifications of Loss by the FCSC.[9]

Shortly after petitioners filed their complaint and motion for a class action in the United States Claims Court, Chief Judge Kozinski heard oral argument and ruled from the bench dismissing an identical claim in Shanghai Power Co. v. United States. He suspended further proceedings in the instant case pending the filing of an opinion in Shanghai Power Co., ruling that "the defendant need not answer the complaint or respond to the motion for

---

9. Letter Chairman, FCSC, to Sen. Sam Nunn, Oct. 29, 1979 (App. A92-A97).

class action certification." On December 30, 1983, Chief Judge Kozinski issued a written opinion dismissing Shanghai Power Co., 4 Cl. Ct. 237 (1983) and on the same day dismissed the instant case for the reason that "this case presents issues identical to those presented in Shanghai Power Co." (App. A10-A11).

Petitioners filed an appeal in the United States Court of Appeals for the Federal Circuit as did Shanghai Power Co. Argument on both cases was heard the same day.

On February 13, 1985 the Court of Appeals, in an unpublished opinion, affirmed the Court of Claims decision in Shanghai Power Co. (App. A28), and on February 28, 1985, in the instant case, the Court of Appeals affirmed the Claims Court's decision for the reason that:

"This case presents issues identical to those presented in Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983). We affirm the decision of the Claims Court based on the holding in that case" (App. A9-A10).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW DEALS WITH AN IMPORTANT QUESTION WHICH WAS EXPRESSLY RESERVED IN A PRIOR DECISION OF THIS COURT - WHETHER JUST COMPENSATION MUST BE PAID FOR FOREIGN CLAIMS SETTLED AND EXTINGUISHED BY THE PRESIDENT FOR LESS THAN FULL VALUE

In Dames & Moore v. Regan, 453 U.S. 654 (1981), this Court left undecided the question of whether the President's settlement of foreign claims for less than their full value, constitutes a taking of property in violation of the Fifth Amendment to the United States Constitution. That case resulted from

the seizure of American personnel as hostages by Iran, and in it, this Court ruled on the power of the President to nullify attachments, and other pending claims against Iran. The Court held:

> Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. As the Court of Appeals for the First Circuit stressed, the sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary, Chas. T. Maine Int'l., Inc. v. Khuzestan Water & Power Authority - F.2d. at _____. But, where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

V.

We do not think it appropriate at the present time to address petitioner's contention that the suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation 14/. Both petitioners and the government concede that the question whether the suspension of claims constitutes a taking is not ripe for review. [citations omitted]. However, this contention, and the possibility that the President's actions may affect a taking of petitioner's property, makes ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act, 28 U.S.C. §1491 in such an event. . . . Accordingly, to the extent, petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act.

14/ Though we conclude that the President has settled petitioner's claims against Iran, we do not suggest that

> the settlement has terminated petitioner's possible taking claim against the United States. We express no views on petitioner's claims that it has suffered a taking.

453 U.S. 654, 688.

Mr. Justice Powell, concurring and dissenting in part, stated:

> I agree with the Court's opinion with respect to the suspension and settlement of claims against Iran and its instrumentalities. The opinion makes clear that some claims may not be adjudicated by the Claims Tribunal, and that others may not be paid in full. The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a "taking" claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges. The government must pay just compensation when it furthers the nation's foreign policy goals by using as "bargaining chips", claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts 2/. The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this

case displace the Just Compensation Clause of the Constitution.

2/ As the Court held in Armstrong v. United States, 364 U.S. 40, 49 (1960):

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole."

The Court unanimously reaffirmed this understanding of the Just Compensation Clause in the recent case of Agins v. City of Tiburon, 447 U.S. 225, [255] 260-261 (1980).

453 U.S. 691.

Mr. Justice Stevens, concurring, held as "remote" the possibility that requiring "petitioner to prosecute its claim in another forum will constitute an unconstitutional 'taking'", (emphasis

supplied) 453 U.S. at 690. He made no finding, however, of the possible remoteness that requiring petitioner to take less than the value of the claim would constitute an unconstitutional taking.

As invited by this Court in Dames & Moore, petitioners, on behalf of themselves and approximately 378 other class members whose losses had been certified by the FCSC, did bring an action in the Claims Court after their China claims were irrevocably extinguished by the President[10].

This important issue, concerning the delicate balance between the powers of the President to conduct foreign relations and the Fifth Amendment's

---

10. Shanghai Power Co. and, recently, Western District Power Co., Shanghai, have been the only other claimants who have filed Tucker Act claims on their own behalf.

guarantee that private property shall not be taken for public use without just compensation has been left muddied by the decisions of the Claims Court and the Court of Appeals. The Claims Court declined to recognize "a cause of action for a Fifth amendment taking on the basis of the President's settlement of a private claim", Shanghai Power Co., 4 Cl. Ct. 237, 249 (1983) (App. A32, A74). In the instant case, the Court of Appeals' entire opinion consisted of the statement, that:

> This case presents issues identical to those presented in Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983). We affirm the decision of the Claims Court based on the holding in that case.[11]

---

11. The Court of Appeals in its opinion in Shanghai Power Co. v. United States, No. 84-860, was slightly more explicit. It found that no taking without just compensation had occurred, apparently because "the settlement provided plaintiff with some compensation for its claim, thus substituting a smaller

App.A8-A9.

To add to the confusion, Judge Kozinski, in another case, Langenegger v. United States, 5 Cl. Ct. 229, 233-234 (1984) citing his own decision in Shanghai, reiterated his holding that "taking" claims arising out of the President's settlement of foreign claims were beyond the jurisdiction of the courts. The Court of Appeals in reviewing Langenegger held that:

> The Claims Court below, incorrectly held that appellants' claim was nonjusticiable and that the extinguishment of a claim under international law cannot ammount to a taking; the Court relied on Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983).

(footnote contimued from previous page)
certain sum for a larger contingent one". (App. A30)

Langenegger v. United States, 757 F.2d, 1565 (1985).

Thus, the Court of Appeals affirmed the dismissal of petitioners' case based on the Claims Court's ruling in Shanghai Power Co., yet one month later stated

that the Claims Court's holding of nonjusticiability in Shanghai Power Co. was incorrect.

This critical issue regarding the conflict between Presidential power to extinguish foreign claims and the Fifth Amendment guarantee against taking without just compensation, which this Court expressly reserved in Dames & Moore, is now ripe for review.

THE DECISION INVOLVES A NOVEL, UNSETTLED IMPORTANT CONSTITUTIONAL ISSUE OF MAJOR SIGNIFICANCE, UNRESOLVED SINCE THE FOUNDING DAYS OF THIS NATION

This Courts' earliest consideration of whether the United States would be liable for "taking" foreign claims was Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). That case resulted from our War of Independence, during which a Virginia statute provided that any monies owed by Virginia citizens to British creditors

might be paid instead to the State, and declared that the debts would thereby be discharged. Later a peace treaty with Great Britain reaffirmed all debts to British creditors and required that they be paid. This Court held that, although Hylton had paid his debt into the Virginia treasury, he had to pay his British creditor as required by the treaty. Although the issue in the case was the validity of the treaty which the Court upheld, with regard to making Hylton pay twice, the Court probably assumed that the state would relieve its citizen of the dual burden. Mr. Justice Cushing suggested that Virginia was bound "in justice and honor to indemnify the debtor, for what it in fact received." Id at 283. But Mr. Justice Chase had a different idea. He wrote:

> That Congress had the power to sacrifice the rights and interests of private citizens to

> secure the safety and prosperity of the public, I have no doubt; but the immutable principles of justice; the public faith of the States, that confiscated and received British debts, pledged to the debtors; and the rights of the debtors violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public. This principle is recognized by the Constitution, which declares, "that private property shall not be taken for public use without just compensation." (Emphasis in original.)

Id at 245.[12]

A few years later, this Court again inferred a right to compensation for the settlement of foreign claims. In United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), the Court considered whether a French vessel which had been captured and condemned as a prize-of-war had to be restored to the owners, as required by a treaty that was enacted

---

12. See, L. Henkin, Foreign Affairs and the Constitution, 259-61 (1972).

between the time of capture and the time of condemnation. Chief Justice Marshall writing for the Court stated:

> [I]n great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the courts but for the government to consider whether it is a case proper for compensation. (Emphasis added.)

5 U.S. (1 Cranch) at 110.

While the Court, in that case recognized the property right of its citizens to their claims, it was not until 1887 that Congress waived sovereign immunity to Fifth Amendment claims by enacting the Tucker Act, Ch. 359, 24 Stat. 505 (1887).

Some years later in Comegys v. Vasse, 26 U.S. (1 Pet.) 193 (1828), this Court once again had occasion to

consider the right of U.S. holders of foreign claims. In that case, the Court was considering the conflicting rights of parties to the same claim. However, Mr. Justice Storey in commenting on the rights of the claimant vis-a-vis the United States stated that:

> Where American citizens have sustained losses or damages by reason of foreign expropriation, they have a right to compensation even though, at that time, only by petition to the government, 26 U.S. (1 Pet.) 216-217.

Although there is no case awarding compensation for a "taking" of a foreign claim by treaty, in 1952, in a case involving an act of Congress, this Court gave support to the old suggestion of Justice Chase. In Cities Service Co. v. McGrath, 342 U.S. 330 (1952), the Court upheld the power of Congress to authorize the Alien Property Custodian to "seize" certain obligations owned by

an enemy alien, and to collect them from the obligor, where the latter was in the United States but the negotiable debenture was not, and therefore could not be physically taken. The Court said that if the obligor should in the future be compelled by a foreign court to make payment on the debenture to a holder in due course, the obligor would be entitled to compensation from the United States under the Fifth Amendment to the extent of any double liability. "[O]nly with this assurance against double liability can it fairly be said that the present seizure is not itself an unconstitutional taking of petitioners' property." Id, 342 U.S. at 336.

Although, until the instant case, the Court of Claims had not squarely ruled on the right to just compensation,

it has consistently favored a right to compensation where the government has "espoused a foreign claim."

In Meade v. United States, 2 Ct. Cl. 224 (1866), the foreign claim of Meade's antecedent against the government of Spain arose when he was imprisoned and his property confiscated during the time of the U.S. Revolution. The Court of Claims rejected Meade's subsequent claim against the United States for his failure to present it to a tribunal of exclusive jurisdiction, but agreed that the U.S. Government's release and cancellation of his claim against Spain would, otherwise, have been an appropriation of private property for public use. It stated:

> The right of the government to take for public use or public welfare the property of a citizen by virtue of the right of eminent domain, and the obligation to make compensation to the citizen for it, are

> universally admitted as concurrent and correlative powers and duties. They are coexistent and coextensive.
>
> Was the release and cancellation of Meade's claim against Spain such an appropriation of private property to public use as comes within the rule of law and the provision of the Constitution? The court think [sic] it was. A man's choses in action, the debts due him, are as much property and as sacred in the eye of the law as are his houses and lands, his horses and his cattle. And when taken for the public good, or released or cancelled to secure an object of public importance, are to be paid for in the same manner. In all such cases the right of the citizen and the obligation of the sovereign are perfect.

2 Ct. Cl. at 275, affirmed on other grounds, 76 U.S. (9 Wall.) 691 (1869).

Later, the Court of Claims again considered whether the government's negotiating away of its citizens' claims constituted a Fifth Amendment taking. In Gray v. United States, 21 Ct. Cl. 340 (1886), the Court considered the "French

Spoilation" claims, which were claims of Americans against France for the seizure of American ships and cargo during the French Revolution in 1793[13].

The Court in Gray after a careful consideration of the conflicting views wrote:

> If "national" claims had been used against "national" claims, . . . no rights . . . could have complicated the situation. But in the negotiation of 1800

---

13. These cases had been agitated for three quarters of a century at a time before the Tucker Act, which gave the Court jurisdiction to hear Fifth Amendment taking cases,was enacted. The Tucker Act, Ch. 359, 24 Stat. 505, was enacted March 3, 1887 giving the Court of Claims jurisdiction to hear all claims "founded upon the Constitution. . . ." It did not apply to the French Spoilation Claims which were barred by the Act's six year statute of limitations. The French Spoilation Cases, of which Gray v. United States was the test case, were advisory opinions to Congress authorized by Special Act of Congress signed into law on January 20, 1885. Ch. 25, 23 Stat. 283. The United States Court of Claims - A History, 1855-1978, 216 Court of Claims Reports 39, 61.

> we used "individual" claims against "national" claims, and the set-off was of French national claims against American individual claims. That any Government has the right to do this . . . is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country. . . .
>
> It seems to us that this "bargain" . . . by which the present peace and quiet of the United States, as well as their future prosperity and greatness were largely secured, and which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation.

21 Ct. Cl. 340, 392-93.

With the exception of the instant case and Shanghai Power Co., other courts which have considered the issue have implied, if not decided, that compromising of foreign claims by the United States for national purposes

constitutes a Fifth Amendment taking. E-Systems, Inc. v. United States, 2 Cl. Ct. 271 (1983). Cf., American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 447 (D.C. Cir. 1981); Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, 651 F.2d 800, 814-15 (1st Cir. 1981); Hidalgo County Water Control & Improvement Dist. v. Hedrick, 226 F.2d 1,6 (5th Cir. 1955).

THE LOWER COURTS HAVE IGNORED A CLEAR AND CONVINCING CONGRESSIONAL PRECLUSION OF JUDICIAL REVIEW OF THE DECISIONS OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION

Both the Claims Court and the Court of Appeals have ignored the "clear and convincing" language of the International Claims Settlement Act of 1949, as amended, which precludes judicial review of the value of petitioners' claims. Cf. Lindahl v.

Office of Personnel Management, ___ U.S. ___, 105 S.Ct. 1620, 1627, 84 L.Ed 2d 674, ___ (1985); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). See, also Dunlop v. Bachowski, 421 U.S. 560, 568 (1975); Dismuke v. United States, 297 U.S. 172, Block v. Community Nutrition Institute, 467 U.S. ___, 104 S.Ct. 2450, 2454, 81 L.Ed 2d 270, ___ (1984). The Act provides that the decisions of the Foreign Claims Settlement Commission:

> shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency or establishment of the United States or by any court by mandamus or otherwise.[14]

The Claims Court to the contrary ruled:

---

14. Ch. 54, 64 Stat. 16, 22 U.S.C. §1623 h , incorporated in the China Claims Act by P.L. 88-666, 78 Stat. 1112, 22 U.S.C. §1643(h).

> To hold that plaintiff had property does not, however, establish its value. The Court rejects plaintiff's contention that the value was that determined by the Foreign Claims Settlement Commission. The FCSC made its valuation entirely on an ex parte basis, with plaintiff alone producing evidence.

4 Ct. Cl. 237, 241 (App. A45 - A46).

The FCSC was originally established in 1950 to hear claims against Yugoslavia, and subsequently, legislation authorizing it to hear claims against China was enacted in 1966.[15] The China Amendment, Title V of the Act, is now found at 22 U.S.C. §§1643-1643k which incorporates by reference portions of the original act.[16] The FCSC's original purpose was

---

15. P.L. 81-455, 64 Stat 12, Mar 10, 1950, as amended by P.L. 89-780, 80 Stat. 1365, Nov. 6, 1966. The FCSC was originally called the International Claims Commission of the United States.

16. Sec. 509, P.L. 88-666, 78 Stat. 1112 incorporated subsections (b),

to adjudicate and distribute a fund of money, the amount of which had previously been agreed by the United States and Yugoslavia in 1948.[17] Any person who made application for payment was held to have consented to all of the provisions of the Act.[18]

Different considerations were behind the later grant of jurisdiction to hear China Claims. There had been no negotiations between the U.S. and China at that time, nor were any forseen in the future. There was no agreement regarding a fund of money, although, nearly 17 years had elapsed since the

---

(footnote continued from previous page) (c), (d), (e), (h) and (j) of Sec. 4, and subsec. (f) of Sec. 7 of the original act. (22 U.S.C. §1643h added 22 U.S.C. §1623 (b), (c), (d),(e), (h) and (j) and §1626(f)).

17. S. Rep. No. 800, 81st Cong, 2d Sess., July 28, 1949.

18. Ch. 54, Sec 7(e), 64 Stat. 17; 22 U.S.C. §1626(e).

Chinese Communist regime had confiscated the property of American nationals. In order to take advantage of the existing trained staff of the FCSC and the records and witnesses still available, the China Claims Act was passed.[19] Its purpose, as in the case of the earlier enacted Cuban Claims Act, was to determine "the amount and validity of claims", and in doing so, was instructed "to apply 'applicable substantive law, including international law.'"[20] Claimants against China were not required to "acquiesce to the conditions of the Chapter" as had the earlier claimants, since there was no fund in hand to distribute.[21]

---

19. H.R. Rep. No. 2233, 89th Cong. 2d Sess., Sept. 6, 1966.

20. S. Rep. No. 1521, 88th Cong., 2d Sess., Sept. 8, 1964.

21. Compare 22 U.S.C. §1643h, not requiring acquiescence with 22

Nevertheless, the FCSC adhered to the same stringent requirements to assure a fair and accurate adjudication as were required by the earlier Act. It was required to and did publish public notice in the Federal Register and gave personal notice to anyone which the Department of State records indicated had expressed an intent to file a claim.[22] The FCSC had the authority to administer oaths, examine witnesses, issue subpoenas under pain of contempt, conduct inquiries, hold hearings on the record, pay mileage and witness fees, compel the production of evidence from witnesses, and take testimony in foreign

---

(footnote continued from previous page) U.S.C. §1642o requiring acquiescence under 22 U.S.C § 1626(e).

22. 22 U.S.C. §1643 h incorporating 22 U.S.C. §1623(b). Notice was published at 33 Fed. Reg. No. 4, Jan. 6, 1968.

countries under letters rogatory.[23] In order to insure the honesty of the claims, in the event a claimant made any false statements, not only was the claimant subject to the penalties of 18 U.S.C. §1001, but he would forfeit all rights under the Act and any payments made as a result could be recovered by the Commission.[24] In short, the FCSC had every power a court could have to insure the accuracy and validity of a claim.

The FCSC was intended to be far more than an investigating and advisory body. In clarifying the judicial status

---

23. 22 U.S.C. §1643 h incorporating 22 U.S.C. §1623(c), (d). FCSC regulations concerning the adjudication of claims against China are found at 45 C.F.R., §§501 and 531 (1983).

24. 22 U.S.C. §1643 h incorporating 22 U.S.C. §1623(e).

of the Commission, this Court in discussing the FCSC's predecessor, the War Claims Commission, stated:

> The final form of the legislation, as we have seen, left the widest range of claims to be determined by adjudication. Congress could, of course, have given jurisdiction over these claims to the District Courts or to the Court of Claims. The fact that it chose to establish a Commission to "adjudicate according to law" the classes of claims defined in the statute did not alter the intrinsic judicial character of the task with which the Commission was charged. The claims were to be "adjudicated according to law," that is, on the merits of each claim, supported by evidence and governing legal considerations, by a body that was "entirely free from the control or coercive influence, direct or indirect," Humphrey's Executor v. United States, supra, 295 U.S., at 629 of either the Executive or Congress (Emphasis added).

Witner v. United States, 357 U.S. 349, 354 (1958).

Far from the FCSC having to accept whatever a claimant offered, it has a "defender of the fund" technique whereby it has "counsel for the Commission designated by it to represent the public interest opposed to the allowance of any unjust or unfounded claim or any portion thereof". FCSC Reg., 45 C.F.R. 531.6(c). A claimant, who cannot sustain his burden of proof as to all elements, will have his claim denied. 45 C.F.R. 531.6(d).[25]

The China claims differed from those which went before, because, in each of the previous claims settlements, there was a fund in existence in which the claimant had to agree to share pro-rata prior to his claim being determined. 22 U.S.C. §1626(e). The

---

25. See, Re, The Foreign Claims Settlement Commission, Its Functions and Jurisdiction, 60 Mich. L. Rev. 1079, 1090 (1962).

China Claims Act did not require this. Compare 22 U.S.C. §1643h with 22 U.S.C. §1642o.

The finality of the FCSC's decisions as applied to domestic courts cannot be doubted at this point[26]. Were the petitioners to now state that their claims were worth more than the FCSC determined, the government would be the first to argue, as it has successfully many times in the past, that the decisions of the FCSC are not judicially reviewable. Eg., First Nat. City Bank v. Gillelland, 257 F.2d 223, cert. denied, 358 U.S. 837 (1958). While one purpose of the International Claims Settlement Act was to certify to the Secretary of State the amount determined to be the loss or damage suffered by the

---

26. Coerper, The Foreign Claims Settlement Commission and Judicial Review, 50 Am. J. Int. L. 868 (1956); Re, supra, note 25 at 1093.

claimant, 22 U.S.C. §1643f, that, by no means, lessened the finality of the FCSC's decision regarding the worth of the underlying foreign claim or allowed the Claims Court to disregard that decision.

THE DECISION BELOW DISREGARDS THE PRINCIPLE THAT THE FIFTH AMENDMENT GUARANTEE AGAINST PUBLIC TAKING WITHOUT JUST COMPENSATION IS CO-EXTENSIVE WITH THE PRESIDENT'S POWER TO CONDUCT FOREIGN AFFAIRS

As this Court held in Armstrong v. United States, 364 U.S. 40, 49 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people to bear public burdens which, in all fairness and justice should be borne by the public as a whole.

Cf. Dames & Moore v. Regan, 453 U.S. at 691 (Powell, J., concurring). The President's power to conduct foreign

affairs does not override other parts of the Constitution, and all of the provisions of the Constitution are deemed to be of equal validity, Prout v. Starr, 188 U.S. 537, 543 (1903). The treaty making powers of the President cannot override the Fifth Amendment, Ried v. Covert, 354 U.S. 1, 15-16 (1956); Geofroy v. Riggs, 133 U.S. 258, 267 (1890).[27] Although the application of this principle is fact-intensive, United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958), the facts in the instant case, when boiled down to their basics, are not difficult.

---

27. See, United States v. Minnesota, 270 U.S. 181, 207-208 (1926); Holden v. Joy, 84 U.S. (17 Wall.) 211, 242-43 (1872); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-621 (1870); Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).

Petitioners had an investment-backed "expectation" in their property. Their antecedents had no more reason to expect expropriation at the time they invested in China than they would have had if they invested in this country. During more than 4,000 years of recorded history, China flourished economically and culturally in the earliest stages of world civilization and was characterized by respect for tradition, conventional social relationships and rule by benevolence, and legalistic practice, Jackson v. People's Republic of China, 550 F. Supp. 869, 870 (N.D. Ala. 1982). Numerous treaties between the United States and China created a climate of security for American investment.[28]

---

28. See, Catalogue of Treaties, 1814-1918, pp. 497-498, U.S. Department of State (1919); Treaty of Peace Amity and Commerce between China and the United States. July 3, 1844, 97 Consolidated Treaty Series

Petitioners' antecedents invested in China in the 1920's, long before the Communist takeover, and long before they had reason to believe that "the potential for expropriation existed." Shanghai Power Co., 4 Cl. Ct. at 246 (App. A64). They had neither reason to believe that our government would have to intervene to protect their interests, ibid, nor reason to expect that if there was an intervention, their claims would be settled without their consent for less than full value. At the time petitioners acquired their property,

---

(footnote continued from previous page)
105 (1969); Treaty of Trade, Consels and Emigration between China and the United States, July 28, 1868, 137 Consolidated Treaty Series 467 (1976); Treaty Regulating Tariff Relations between United States and China, July 25, 1928, 107 League of Nations Treaty Series 125 (1930); Arbitration Treaty between the United States and China, June 27, 1930, 140 League of Nations Treaty Series 184 (1933).

they had an "investment-backed expectation" that it would not be taken by the U.S. for less than just compensation. After expropriation they had an "investment-backed expectation" that eventually they would receive just compensation from China in its courts or ours. Cf., Penn Central Transp. Co. v. N.Y. City, 438 U.S. 104, 124 (1978). That expectation was permanently and totally extinguished by the 1979 U.S.-China Agreement.

To put this controversy in a more mundane context, if petitioners owned some farmland in North Dakota and the United States took the land to build a road to Canada in order to foster better relations and improve trade between the two nations, would not the government be required to pay compensation even though the President was acting within his

authority to conduct foreign relations, or because petitioners, as U.S. citizens, would also benefit from improved relations with Canada, or because they too, could use the road to take their produce o a Canadian market? And if a bank with a mortgage on the property had its claim extinguished, would not the government be liable to it? Clearly, we think the government would be required to pay just compensation.

What then are the differences between petitioners' claims and those of the North Dakota farmer and the bank? We submit there are none. In both cases, the President is acting within his constitutional power to conduct foreign relations. In both cases there is a taking, not only of physical property, but also of a chose-in-action.

And in both cases, petitioners are not only incidental beneficiaries, along with all other citizens, but also directly benefit by having a new road for marketing their goods. Yet this Court or any other would have little pause in finding that just compensation was due for the taking of not only the land, but also the mortgage. So too, it is due for the taking of petitioners' claims.

It was suggested by the Claims Court that where only one of a "bundle of rights" is taken, or only part of the use of the property is denied the owner, there is no taking. Shanghai, 4 Ct. Cl. 242-243, n. 7 (App. A81-A82). However, in every case cited by the court, the property owner was left either with his entire property, although with a less economic use than he had hoped, e.g.

Penn Central Transportation Co. v. New York City, supra, or was denied a particular use of his property because of overriding conflicting public policies. E.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915). In no case was the entire property taken, less than its just value paid, and the government then exonerated after having only paid part value.

In the instant case, the government has totally extinguished petitioners' claims, paying 41% of their principal value not including interest, yet the Court of Appeals in Shanghai has ruled that there was no taking because the claimholder received "some compensation for its claim, thus substituting a smaller certain sum for a larger contingent one", (App. A28-A31). Were that the rule, the government could take

any property for less than its full value, whether farm land in North Dakota or a foreign claim, and not have to pay the difference in value.

THE ISSUE INVOLVES NUMEROUS PENDING CASES WITH ENORMOUS AMOUNTS OF MONEY IN DISPUTE

In the China claims program alone, there are a large number of claims with enormous amounts involved. Out of 579 claims filed, the FCSC certified favorable decisions in 378 claims (not including three later claims) resulting in certified losses in the total principal amount of $196,861,841 with interest at the rate of 6% per annum from the date of loss, to the date when the claims were settled by agreement with the PRC.[29] Interest at a simple rate of 6% from 1950, when the property

29. See, Summary of the China claims program, App. A105-A113.

was expropriated, to 1979 when the claims were settled, amounts to an additional $225 million. If interest is compounded, the amount of the cumulative certified losses exceeds 1.2 billion dollars.

The amount distributed to the claimants as a result of the settlement agreement was $80 million; which equalled the amount of Chinese assets frozen in the United States prior to China's expropriation of the U.S. nationals' properties. That is only 41% of the principal amount of certified losses, or 19% of those losses plus simple interest, or 7% of those losses with compound interest.[30]

---

30. Neither the International Claims Settlement Act nor the FCSC certifications of loss state whether interest is to be simple or compound.

Numerous claims are involved. The named petitioners have filed a class action on behalf of all claimholders. Two claimholders have filed actions on their own behalf, namely, Shanghai Power Co. and the Western District Power Co., Shanghai[31]. Furthermore, the "bargaining away" of the foreign claims also affects other suits for foreign claims now pending. E-Systems, Inc. v. United States, 2 Cl. Ct. 271 (1983) (motion for summary judgment denied) is a claim arising from the Iranian hostage situation which is pending in the Claims Court and awaiting final determination of the Iranian Claims Settlement Commission. Also, in Ramirez v. Weinberger, 745 F.2d 1500, (D.C. Cir. 1984), cert. granted, No. 84-1389, May

31. Western District Power Company, Shanghai filed an action in the Claims Court on May 10, 1985.

20, 1985, the question of whether there has been a Fifth Amendment taking, has been raised. (The United States is challenging the Court of Appeals' ruling of the judiciability of an alleged occupation of a U.S. citizen's cattle ranch in Honduras by officials of the United States Government).

As this Court has noted, there have been no fewer than eighty executive agreements entered into by the United States for the liquidation of its citizens' claims during the period 1817-1917, and since 1952 the President has entered into at least 10 binding settlements with foreign nations including the China Agreement. Dames & Moore v. Regan, 453 U.S. 654, 679, 680. The legislative history of the International Claims Settlement Act states that it contemplates settlements

of a similar nature in the future. Dames & Moore v. Regan, 453 U.S. 654, 681. This issue, which has troubled the courts for two hundred years and which will continue to be troublesome until decided, is squarely presented in this case.

CONCLUSION

For the foregoing reasons, this petition for writ for certiorari should be granted.

Respectfully submitted,

Sheldon I. Cohen
Sheldon I. Cohen & Assoc.
Suite 708
2009 N. 14th Street
Arlington, VA 22201
(703) 522-1200
Attorney for Petitioners

Howard B. Silberberg
Silberberg & Rosenberg
Suite 202
1489 Chain Bridge Road
McLean, VA 22101
(703) 821-1800
Attorney for Petitioners

APPENDIX

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA CONCERNING THE SETTLEMENT OF CLAIMS

In order to develop bilateral economic and trade relations and to complete the process of normalization of relations on the basis of equality and mutual benefit and in accordance with the spirit of the Joint Communique on Establishment of Diplomatic Relations between the United States of America and the People's Republic of China,[1] the Government of the United States of America (hereinafter referred to as the "USA") and the

---

1. Department of State Bulletin, Jan., 1979, p. 25.

Government of the People's Republic of China (hereinafter referred to as the "PRC") have reached this Agreemen:

ARTICLE I

The claims settled pursuant to this Agreement are:

(a) the claims of the USA and its nationals (including natural and juridical persons) against the PRC arising from any nationalization, expropriation, intervention, and other taking of, or special measures directed against, property of nationals of the USA on or after October 1, 1949 and prior to the date of this Agreement; and

(b) the claims of the PRC, its nationals, and natural and juridical persons subject to its jurisdiction or

control against the USA arising from actions related to the blocking of assets by the Government of the USA on or after December 17, 1950 and prior to the date of this Agreement.

ARTICLE II

(a) The Government of the USA and the Government of the PRC agree to a settlement of all claims specified in Article I. The Government of the PRC agrees to pay to the Government of the USA the sum of $80.5 million as the full and final settlement of the claims specified in Article I. The Government of the USA agrees to accept this sum in full and final settlement of those claims.

(b) The Government of the USA agrees to unblock by October 1, 1979 all assets which were blocked because of an

interest, direct or indirect, in those assets of the PRC, its nationals, or natural and juridical persons subject to its jurisdiction or control, and which remained blocked on the date of the initialing of this agreement, March 2, 1979. The Government of the USA further agrees, in a spirit of mutual cooperation, that prior to unblocking under this paragraph, it will notify the holders of blocked assets which the records of the Government of the USA indicate are held in the name of residents of the PRC that the Government of the PRC requests that assets of nationals of the PRC to be unblocked not be transferred or withdrawn without its consent.

ARTICLE III

The Government of the PRC shall pay to the Government of the USA $80.5 million of which $30 million shall be paid on October 1, 1979 and the remaining $50.5 milion shall be paid in five annual installments of $10.1 million each on the first day of October with the first installment due on October 1, 1980.

ARTICLE IV

The Government of the USA shall be exclusively responsible for the distribution of all proceeds received by it under this Agreement.

ARTICLE V

After date of signature of this Agreement, neither government will

present to the other, on its behalf or on behalf of another, any claim encompassed by this Agreement. If any such claim is presented directly by a national of one country to the government of the other, that government will refer it to the government of the national who presented the claim.

ARTICLE VI

This Agreement shall enter into force on the date of signature.

This Agreement was signed on May 11, 1979, at Beijing, in duplicate, in the English and Chinese languages, both versions being equally authentic.

FOR THE GOVERNMENT
UNITED STATES OF AMERICA

/s/ Juanita M. Kreps

FOR THE GOVERNMENT OF THE
PEOPLE'S REPUBLIC OF CHINA

/s/ Zhang Jingfu

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GERALD WILLIAM LUCKER, et al.,	)	
Appellant,	)	
vs.	)	Appeal No. 84-809
THE UNITED STATES,	)	
Appellee.	)	

DECIDED: February 28, 1985

Before MARKEY, Chief Judge, NICHOLS, Senior Circuit Judge, BALDWIN, KASHIWA, and MILLER, Circuit Judges.

KASHIWA, Circuit Judge.

DECISION

The decision of the Claims Court dismissing the complaint of appellants is affirmed.

OPINION

This case presents issues identical to those presented in Shanghai Power Co. v.

United States, 4 Cl. Ct. 237 (1983). We affirm the decision of the Claims Court based on the holding in that case.

MILLER, Circuit Judge, concurring.

I agree with the result reached by the majority, but for the reason that I am persuaded that Lucker's claim is one "growing out of" or "dependent upon" a treaty within the meaning of 28 U.S.C. Section 1502.

IN THE UNITED STATES CLAIMS COURT

GERALD WILLIAM LUCKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 595-83C
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

ORDER

This case presents issues identical to those presented in Shanghai Power Co. v. United States, No. 674-81C, (Cl. Ct. Dec. 30, 1983) (KOZINSKI, C.J.). Based on the holding of that case, the clerk is directed to dismiss the complaint.

December 30, 1983

Alex Kozinski
Chief Judge

A10

IN THE UNITED STATES CLAIMS COURT

No. 595-83 C

GERALD WILLIAM LUCKER and GILLIAN C. LUCKER and HARRY A. LUCKER, JR. and LUCY A. LUCKER and WILLIAM J. LUCKER on Behalf of Themselves and all Members of a Class Similarly Situated	)	Filed Dec. 30, 1983
v.	)	Judgment
THE UNITED STATES	)	

Pursuant to the order of December 30, 1983, it was held that plaintiffs are not entitled to recover with the complaint to be dismissed.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Frank T. Peartree

Clerk of Court

All

IN THE UNITED STATES CLAIMS COURT

GERALD WILLIAM LUCKER	)	
	)	
and	)	
	)	
GILLIAN C. LUCKER	)	
	)	
and	)	
	)	
HARRY A. LUCKER, JR.	)	
	)	
and	)	
	)	
LUCY A. LUCKER	)	
	)	
and	)	
	)	
WILLIAM J. LUCKER	)	No. 595-83C
	)	FILED: 9/27/83
ON BEHALF OF THEMSELVES AND ALL OTHER MEMBERS OF A CLASS SIMILARLY SITUATED	)	
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
THE UNITED STATES OF AMERICA	)	
	)	
Defendant	)	

COMPLAINT

1. Jurisdiction is founded on 28 U.S.C. Section 1491.

2. Plaintiffs bring this action on behalf of themselves and all other members of a class similarly situated to recover just compensation from the Defendant, the United States of America, for the taking of plaintiffs' and said others private property without compensation and without due process of law in violation of plaintiffs' and said others rights under the Fifth Amendment to the Constitution of the United States. The claims arose as a result of the confiscation of plaintiffs' and said others property by the Peoples Republic of China (the "PRC") and the extinguishment by the Defendant of any right, claim or ability by plaintiffs and

said others to obtain compensation from the PRC.

3. The class is defined as those persons, both natural and juridical, who have received a certification or loss or who have an interest under those who have received a certification or loss from the Foreign Claims Settlement Commission of the United States (the "FCSC") for the taking of their property by the PRC. There were 378 claims against the PRC which resulted in certifications by the FCSC and which have been extinguished by Defendant by virtue of an executive agreement between defendant and the PRC. Many of the original claimants are deceased or defunct and those persons holding in their right exceed the number of certifications. It is therefore impracticable to bring all of the

claimants or those holding under them before the Court. There are questions of law and fact presented herein which are common to the entire class of persons whose claims have been extinguished. The claims of Plaintiffs herein are typical of the claims of said class and the Plaintiffs will fairly and adequately protect the interest of said class. Only one claimant, to Plaintiffs' knowledge, has brought an action heretofore to protect its interest.

4. The claims of Plaintiffs and the other class members arose on May 11, 1979 at Beijing, PRC, as is hereinafter more fully set forth.

5. Plaintiffs Gerald William Lucker, Gillian C. Lucker, Harry A. Lucker, Jr., Lucy A. Lucker, and William G. Lucker are

heirs both at-law and under the will of Harry A. Lucker, deceased. Said Plaintiffs are all citizens of the United States and are the successors in interest to seventy-five percent of the interest of Gerald D. Lucker, deceased, who was executor of the estate of said Harry A. Lucker, and who was trustee in liquidation of the American Chinese Company, Federal, Inc., U.S.A. now dissolved.

6. Harry A. Lucker prior to this death was a citizen of the United States.

7. American Chinese Company, Federal, Inc., U.S.A. was, prior to its dissolution, a national of the United States.

8. Harry A. Lucker owned in the City of Tientsin, China, a piece of real

property on which stood a furnished three story residence and an adjoining garage.

9. Harry A. Lucker and Gerald D. Lucker were the owners of all of the stock of American Chinese Company, Federal, Inc., U.S.A. which owned and operated an automobile dealership in the City of Tientsin, China and which also owned real estate in that city consisting of a three story commercial building covering one-half of a city block.

10. In December, 1950 the aforesaid property of Harry A. Lucker, and of the American Chinese Company, Federal, Inc. U.S.A. was confiscated by the Chinese Communist Regime (the PRC).

11. The PRC's obligation to Plaintiffs under applicable substantive law including international law, resulting

from the PRC's December, 1950 actions was adjudicated by the FCSC under the provisions of Title V of the International Claims Settlement Act of 1949, as amended, 22 U.S.C. Section 1643-1643K (the "Act"). The decisions of the FCSC dated June 30, 1970 determined that in claim No. CN-0556, Decision No. CN-500, as a result of the PRC seizures, Gerald D. Lucker executor of the estate of Harry A. Lucker, deceased had suffered a loss of $70,000.00 plus interest at 6 percent per annum from December 22, 1950, and that in Claim No. CN-0555, Decision No. CN-506, Gerald D. Lucker as trustee of the American Chinese Company, Federal, Inc., U. S. A. had suffered a loss of $50,000.00 plus interest at 6 percent per annum from December 31, 1950, interest to run until the date of payment of the

obligation. A copy of the FCSC decisions are attached hereto as Exhibits A and B.

12. The FCSC also certified as valid under the China Claims Act an additional 376 claims in which it found that the aggregate losses of all private American claimants as a result of PRC actions after October 1, 1949 amounted to $196,861,841 plus interest at 6 percent per annum to date of payment. These additional 376 claims are held by the members of the class, as hereinabove defined, for whom Plaintiffs seek to bring this action.

13. On September 19, 1979, the FCSC entered an order substituting Plaintiffs Gerald William Lucker, Gillian C. Lucker, Harry A. Lucker, Jr., Lucy A. Lucker and William G. Lucker as parties in interest

to seventy-five percent of Claim No. CN-0556 and certified that said Plaintiffs had sustained losses of property in China within the meaning of the Act. A copy of the Order substituting Plaintiffs as parties is attached hereto as Exhibit C.

14. On or about November 19, 1980, the United States Department of the Treasury determined that the certification of loss in Claim No. CN-0555 be distributed to said Plaintiffs as successors in interest of the former shareholders of the American Chinese Company, Federal, Inc., U. S. A.. A copy of said determination is attached hereto as Exhibit D.

15. The decisions of the FCSC are final and conclusive on all questions of law and fact and not subject to review by

the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise. (22 U.S.C. Section 1623(h), rendered applicable to claims against China by 22 U.S.C. Section 1643h.)

16. From December 22, 1950 to 1979 neither Plaintiffs nor any members of the class received any payment in respect of the seizure of their properties by the PRC. Based upon the FCSC's determination, Plaintiffs' interest in the claims against the PRC, calculated as of May 11, 1979, amounted to $153,000 using simple interest at the rate of 6 percent per annum, and $469,722 using interest compounded annually at the same rate. The total amount of all awards due as of May 11, 1979 amounted to approximately

$531,526,940 using simple interest at the rate of 6 percent per annum, and $1,156,390,900 using interest compounded annually at the same rate.

17. On May 11, 1979, in Beijing, People's Republic of China, Defendant United States of America signed an "Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims" (the "Executive Agreement"). The stated purposes of the Executive Agreement are "to develop bilateral economic and trade relations and to complete the process of normalization on the basis of equality and mutual benefit . . . ." A copy of the Executive Agreement is attached hereto as Exhibit E.

18. As part of the Executive Agreement the Defendant agreed to the "full and final settlement" of "the claims of the USA and its nationals (including natural and juridical persons) against the PRC arising from any nationalization, expropriation, intervention, and other taking of, or special measures directed against, property of nationals of the USA on or after October 1, 1949 and prior to the date of this Agreement . . . ." In exchange for this settlement, the PRC agreed to pay the United States of America $80.5 million in six installments the last of which is payable on October 1, 1984.

19. If payments are made by the PRC to the United States of America in accordance with the Executive Agreement

and if those payments are distributed to American claimants pursuant to existing U. S. law, Plaintiffs can expect to receive approximately $36,800 of its claim of over $469,722. Other members of the class can expect similar reductions of their claims.

20. The difference between Plaintiffs' claims against the PRC, as certified by the FCSC, and the maximum compensation agreed to by the United States of America is not less than $423,922. The provisions of the Executive Agreement preclude Plaintiff from recovering that amount from the PRC.

21. The defendant has offered to pay the named Plaintiffs and all other members of the class only about 41 percent of the amount originally

certified by the FCSC without consideration of any accrued interest.

22. As a result of Defendant's extinguishment of Plaintiffs' claims against the PRC, Defendant has taken property of Plaintiffs valued at not less than $469,722 in exchange for compensation of, at most, $36,800.

23. Said taking of Plaintiffs' and other class members' property by Defendant was for a public use, i.e., the normalization of political and economic relations between the United States of American and the PRC.

24. The Executive Agreement extinguishing Plaintiffs' and other class members' claims as adjudicated by the FCSC constitutes a taking of Plaintiffs' property in violation of the Fifth

Amendment of the United States Constitution without just compensation and without due process of law.

25. As a result of this taking of the property of Plaintiffs' and other class members for a public use, the Fifth Amendment to the United States Constitution requires that Defendant United States of America compensate Plaintiffs and other class members for the property taken.

WHEREFORE, Plaintiffs pray on behalf of themselves and other members of the class that: (a) a judgment be entered against the Defendant United States of America in favor of the named Plaintiffs in the amount of not less than $432,922 and (b) judgment be entered on behalf of all other members of the class similarly

situated in such amounts as the court, upon proof, deems fair and just; and (c) judgment be entered to include interest, costs, disbursements, and expenses, including attorneys fees.

Respectfully submitted,

Sheldon I. Cohen
2009 N. 14th Street, #708
Arlington, Virginia 22201
703-522-1200

Howard B. Silberberg
1489 Chain Bridge Road, #202
McLean, Virginia 22101
703-821-1800

Attorneys for Plaintiffs

Of Counsel:
Silberberg, Frey & Rosenberg

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SHANGHAI POWER COMPANY,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal No.
	)	84-860
THE UNITED STATES,	)	
	)	
Appellee.	)	

DECIDED: February 13, 1985

Before MARKEY, Chief Judge, NICHOLS, Senior Circuit Judge, BALDWIN, KASHIWA, and MILLER, Circuit Judges.

KASHIWA, Circuit Judge.

DECISION

The decision of the Claims Court (Kozinski, Chief Judge), dismissing a claim by Shanghai Power Company (Shanghai) for just compensation upon dispositive cross-motions for summary judgment, 4 Cl. Ct. 237 (1983), is affirmed.

Assuming for purposes of the motion that Shanghai's "claim" against the Peoples Republic of China constituted property, and that the claim was "worth" more than Shanghai received as a result of the settlement negotiated by the President, we conclude as did the Claims Court, that no taking without just compensation has occurred:

> With appropriate regard for the interests of the nation as a whole (including those of [Shanghai] and the other claimants), the President normalized relations with the PRC. Neither normalization of relations nor satisfaction of [Shanghai's] claim would have been possible without the other. The President, in the exercise of his constitional prerogative, struck the bargain he determined would best accommodate all relevant interests.... (footnote omitted).

4 Cl. Ct. at 246. The Claims Court in the omitted footnote noted that the President's action resulted in both direct and incidental benefits to plaintiff. Directly, the settlement provided plaintiff with some compensation for its claim, thus substituting a smaller certain sum for a larger contingent one.

Because Shanghai has not shown error requiring reversal of the Claims Court's judgment, we affirm. We appreciate Judge Miller's observation under 28 U.S.C. Secton 1502 but we need not rule on it where the cause of action is without merit. Monet v. United States, 419 F.2d 434, 436 n.4 (Ct. Cl. 1969), cert. denied, 400 U.S. 846 (1970); Boeing Co. vs. U.S., 480 F.2d 854, 856, (Ct. Cl. 1973).

MILLER, Circuit Judge, concurring.

I concur in the result reached by the majority, but would affirm the Claims Court's decision to dismiss, because I am persuaded that Shanghai's claim is one "growing out of" or "dependent upon" a treaty within the meaning of 28 U.S.C. Section 1502.

SHANGHAI POWER COMPANY,
Plaintiff,

vs.

The UNITED STATES,
Defendant.

No. 674-81C.

United States Claims Court

December 30, 1983

OPINION

KOZINSKI, Chief Judge.

The President settled plaintiff's claim against the People's Republic of China (PRC) without plaintiff's consent. The question presented is whether plaintiff can state a claim under the just compensation clause of the fifth amendment for the difference between what it received under the terms of the

was worth.

FACTS

Starting in 1929, plaintiff Shanghai Power Company, a Deleware corporation, owned and operated a power plant in Shanghai, China. A franchise agreement between plaintiff and the Shanghai Municipal Council allowed plaintiff to generate and distribute electricity in the Shanghai area.

In 1950, the People's Republic of China confiscated all property within its borders belonging to U.S. nationals, including plaintiff's power plant. From that time until 1979, when the United States normalized relations with the PRC, plaintiff received no compensation for the loss of its property.

In 1966, Congress authorized the Foreign Claims Settlement Commission (FCSC) to evaluate the claims of the U.S. nationals against the PRC. On the basis of the evidence presented by the claimants, the Commission in 1972 determined the value of the property seized by the PRC to have been about $197 million. Plaintiff's share of this amount was almost $54 million. The Commission also found that the claimants were entitled to 6% simple interest from the date of taking; with interest, plaintiff's claim came to more than $144 million.

In 1979, President Carter established diplomatic relations with the PRC. As part of the normalization process, the two nations settled the outstanding claims of U.S. nationals against the PRC.

The claims were settled for $80.5 million to be paid to the United States over a period of six yers. The United States, in turn, has been paying each of the claimants a pro rata share of the amounts received from the PRC, minus a small administrative fee. Under the terms of the settlement, plaintiff is due to receive approximately $20 million, or $124 million less than under the FCSC formula. Plaintiff is suing to recover the difference from the United States.

Plaintiff argues that President Carter settled its claim against the PRC for a mere fraction of its value in order to achieve broader foreign policy objectives. It cites various White House and State Department pronouncements indicating that normalization of relations with the PRC was considered a

highly desirable objective. Plaintiff suggests that the President and the State Department considered the outstanding claims of the U.S. nationals a hindrance to normalization of relations and decided to remove the obstacle by sacrificing those claims. This enabled the President to achieve the public purpose--the normalization of relations with the PRC--at its expense. This, plaintiff argues, is a taking for which is must be compensated. Defendant disagrees. The parties have cross-moved for summary judgment.

Discussion

(1) In order to state a claim for a taking under the fifth amendment's just compensation clause, the plaintiff must establish that it was the owner of property and that such property was taken

by the United States for a public purpose. Public Water Supply District No. 3 v. United States, 135 F.Supp.887, 133 Ct.Cl. 348, 352 (1955). Because plaintiff's claim raises novel issues, each component of this test must be examined in turn.

A. Did plaintiff have property?

1. The concept of property for purposes of the fifth amendment has been interpreted broadly and can include "every sort of interest the citizen may possess." United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945) (leaseholds are property). See also Armstrong v. United States, 364 U.S. 40, 44, 80 S. Ct. 1563, 1566, 4 L.Ed.2d 1554 (1960) (lien is property); Lynch v. United States, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78

L.Ed. 2434 (1934) (contract rights are property); In re Air Crash in Bali, Indonesia, 684 F.2d 1301, 1312 (9th Cir.1982) (claims for compensation are property).

On the other hand, not all interests or expectancies amount to property for purposes of the fifth amendment. As the Supreme Court has noted, only those rights "which have the law back of them" are property. Kaiser Aetna v. United States, 444 U.S. 164, 178, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979) (quoting United States v. Willow River Power Co., 324 U.S. 499, 502, 65 S.Ct. 761, 764, 89 L.Ed. 1101 (1945)). Cf. Deltona Corp. v. United States, 657 F.2d 1184, 228 Ct.Cl. 476, 491 (1981) (mere expectancy is not property). For example, no property interest can be acquired in the high

water level of a river. Willow River Power Co., 324 U.S. at 511, 65 S.Ct. at 768. Similarly, a private party cannot generally acquire rights in the navigable waters of the United States. See, e.g., United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 62, 33 S.Ct. 667, 57 L.Ed. 1063 (1913). See generally Morreale, Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation, 3 Nat. Resources J. 1 (1963). But see Kaiser Aetna, 444 U.S. at 178, 100 S.Ct. at 392. A person also requires no property interest in contraband, see Ziffrin, Inc. v. Reeves, 308 U.S. 132, 140, 60 S.Ct. 163, 167, 84 L.Ed. 128 (1939), or by virtue of an expectancy unsupported by a contractual or other obligation. See United States v. Pety Motor Co., 327 U.S. 372, 380 n. 9, 66 S.Ct. 596, 601 n. 9, 90 L.Ed. 72

(1946) (expectation that lease would be renewed is not property); Restatement (Second) of the Foreign Relations Law of the United States, Section 191 illustration 2 (1965) (beneficiary of will has no property interest during life of testator) [hereinafter cited as Restatement].

[2] From these authorities it appears that plaintiff's interest will be recognized as property for purposes of the fifth amendment unless that interest is devoid of a legally enforceable right or recognition of a property interest would contravene public policy. Under this standard, plaintiff's claim against the PRC amounts to property. The United States has consistently taken the view that foreign governments are entitled to confiscate property belonging to U.S.

nationals. See, e.g., Note from U.S. Secretary of State Hull to Mexican Ambassador in Washington (Apr. 3, 1940), quoted in 3 G. Hackworth, Digest of International Law 662 (1942). However, the United States has also consistently maintained that such a taking must be accompanied by "adequate, effective and prompt compensation." Id. 1/ Accord Restatement Section 185-190. The right to such compensation for an expropriation is, moreover, a principle recognized in international law, Domke, Foreign Nationalizations, 55 Am.J. Int'l L. 585, 603-04 (1961), and one the United States has consistently supported. See generally 8 M. Whiteman, Digest of International Law 1085-1136 (1967) [hereinafter cited as Whiteman, Digest.]

[3] Defendant argues that plaintiff's

claim is not property because plaintiff could not have raised it against the PRC in American courts under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. Section 1602-1611 (1976), because the exprorpriation was an act undertaken by the PRC in its sovereign capacity. See, e.g., International Association of Machinists and Aerospace Workers v. OPEC, 477 F.Supp. 553, 568-69 (C.D.Cal.1979), aff'd, 649 F.2d 1354 (9th Cir.1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982). Plaintiff responds that it could nevertheless have established jurisdiction under the FSIA by virtue of the licensing agreement under which it operated its power plant. 2/ It is unnecessary to resolve this dispute because the existence of jurisdiction under the FSIA has no bearing on the

threshold question of whether plaintiff has property for purposes of the fifth amendment. But see p. 241 & n. 4 infra. The FSIA does not affect the substantive law of liability; it merely provides a forum for the presentation of claims established elsewhere. H.R. Rep. No. 1487, at 12, 1976 U.S. Code Cong. & Ad. News 6610. Whether plaintiff has a judicial forum in this country (or elsewhere) to present its claim has no relevance to whether its claim has the law back of it. Even if it were established, as defendant argues, that no suit could be maintained under the FSIA, or indeed in any court in any country, that would not change the fact that international law gives plaintiff an entitlement to full and just compensation, and that our government has consistently endorsed that right.

While in the domestic context it is difficult to conceive of a right without reference to a forum where the right can be enforced, that concept is not foreign to international law. See generally 1 M. Whiteman, Damages in International Law 275 (1937). Indeed, much of our government's efforts in espousing claims of its citizens has been devoted to establishing fora for such rights, generally in the nature of international commissions or tribunals. See M. Hudson, International Tribunals 3-14 (1944).

[4] Rights created under international law against foreign governments are generally more difficult to vindicate than those created under domestic law between private parties. That does not, however, render international legal rights so illusory as to exclude them

altogether from the classification of property. There is no doubt that rights created by virtue of an expropriation are backed by accepted principles of international law. Moreover, recognition of such rights is not contrary to our public policy, but, indeed, is consistent with the repeated expressions of our State Department. 3/The court therefore concludes that plaintiff's claim against the PRC had the law back of it and amounted to property for purposes of the fifth amendment.

2. To hold that plaintiff had property does not, however, establish its value. The court rejects plaintiff's contention that the value was that determined by the Foreign Claims Settlement Commission. The FCSC made its valuation entirely on an ex parte basis, with plaintiff alone

producing evidence. See generally 8 Whiteman, Digest 1146-50. Moreover, the FCSC was valuing an entirely different asset than that allegedly taken here. The Commission's function was to determine the value of plaintiff's plant, i.e., the bricks, mortar, power generators, etc. In 1979, however, at the time of the alleged taking by the United States, plaintiff no longer owned these assets; instead it owned a claim for compensation against the PRC. The value of that claim might have been the same as that of the underlying property but it might have been different. That value would depend upon the likelihood of finding a forum for presenting the claim, 4/overcoming all relevant defenses and obtaining satisfaction from the debtor's available assets. Moreover, the expense of prosecuting such a claim and

obtaining satisfaction would have to be taken into account. See also n.15 infra.

It is impossible to determine the value of plaintiff's property interest without proof on these issues. Consequently, the court cannot decide whether that value is more or less than what plaintiff is receiving from settlement of its claim by the President. For purposes of these motions, the court must therefore assume that plaintiff not only had a property interest but that such interest was worth more than plaintiff is receiving as a result of the settlement of its claim by the President.

B. Was there a taking?

1. The Supreme Court has noted that the "Fifth Amendment's guarantee...[is]

designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d. 1554 (1960); accord Deltona Corp., 657 F.2d at 1191, 228 Ct.Cl. at 488. The Court has admitted, however, that it "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Central Transportation Co. v. New York City, 488 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). The Court has repeatedly admonished that the determination must be made on the basis

of "the particular circumstances [of each] case." Id. (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958)); accord Deltona Corp., 657 F.2d at 1191, 228 Ct.Cl. at 488; see Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed.Cir.1983).

[5] In determining whether there has been a taking it is important to distinguish in the first instance between those governmental actions that amount to a physical invasion or other appropriation of property 5/and those actions where the government is serving as an arbiter between the conflicting rights and interests of its citizens. 6/ See generally Sax, Takings and the Police Power, 74 Yale L.J. 36, 38-41 (1964). As the Court noted in Penn Central, a taking

is "more readily ... found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124, 98 S.Ct. at 2659.

[6] Even when government is serving as an arbiter between conflicting rights, its action can amount to a taking if it frustrates "distinct investment-backed expectations" of the property owner. Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659; Deltona Corp., 657 F.2d at 1191, 228 Ct.Cl. at 487. This somewhat cryptic phrase describes a concept of fundamental justice and fair play, and suggests that even valid regulatory action can result in a taking if government shifts too

heavy a burden upon a few individuals, and does so in a sudden and unanticipated manner so that those adversely affected have little opportunity to protect themselves in the marketplace.

[7] Factors relevant to whether there has been a taking are the degree to which the property owner's rights were impaired, 7/ the extent to which the property owner is an incidental beneficiary of the governmental action, 8/the importance of the public interest to be served, 9/whether the exercise of governmental power can be characterized as novel and unexpected for falling within traditional boundaries, 10/ and whether the action substituted any rights or remedies for those that it destroyed. 11/ In determining whether a taking has occurred

the court must weigh all of the relevant factors and decide whether compensation is required by principles of justice and fair play. See Andrus vs. Allard, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed.2d 210 (1979); Deltona Corp., 657 F.2d at 1191, 228 Ct.Cl. at 488.

> [W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 U.S. 51, 65-66, 100 S.Ct. 318, 326-327, 62 L.Ed.2d 210 (1979). Restrictions on the use of property that have greatly diminished its value have not amounted to takings if significant value was left to the property owner. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (92.5% diminution in value). See also Agins v. City of Tiburon, 447 U.S. 255, 262-63, 100 S.Ct. 2138, 2142-43, L.Ed.2d 106 (1980)

(plaintiff who had intended to use land for multiple unit construction limited to five single family dwellings); Jentgen v. United States, 657 F.2d 1210, 1212-13, 228 Ct.Cl. 527, 533-34 (1981), cert. denied, 455 U.S. 1017, 102 S.Ct. 1711, 72 L.Ed.2d 134 (1982) (plaintiff who sought to develop 80 acres limited to 20 acres).

2. The occasion for diplomatic espousal and settlement of a claim arises when one or more of our nationals runs into difficulty collecting a debt from a foreign government. 12/ That event may have implications going far beyond the particular debt in question or the parties raising the claim. It is axiomatic that our government cannot guarantee unimpeded commerce with foreign nations, nor even the lives and property of U.S. nationals outside our territory. The degree to which our government is able to assist U.S. nationals abroad

depends largely on its ability to maintain amiable relations with other governments.

When a foreign government reneges on a debt to a U.S. national, "a claimant's only hope of obtaining any payment at all might lie in having his government negotiate a diplomatic settlement on his behalf." Dames & Moore v. Regan, 453 U.S. 654, 679, 101 S.Ct. 2972, 2986, 69 L.Ed.2d 918 (1981). The President, however, has no obligation to take up a national's claim and present it diplomatically to a foreign government. See Aris Gloves, Inc. v. United States, 420 F.2d 1386, 1394-95, 190 Ct.Cl. 367, 380-81 (1970) (quoting 6 Memoirs of John Quincy Adams 383 (C. Adams ed. 1874)). The reason for this is made clear by Adams: It is frequently very difficult to

obtain justice from foreign nations, even when the claim is a strong one; therefore, a country asserting the claim may have to resort to war to force satisfaction of the claim, and war may inflict greater, uncompensated injury upon many other people. Id.

Because a government's refusal to honor debts owed a foreign national is frequently symptomatic of more serious problems between the two countries, governments have traditionally espoused and settled claims without the consent of the nationals holding the claims and "usually without exclusive regard for their interests, as distinguished from those of the national as a whole." Dames & Moore, 453 U.S. at 680, 101 S.Ct. at 2987 (quoting L. Henkin, Foreign Affairs and the Constitution 262-63 (1972));

accord Restatement Section 213; 8 Whiteman, Digest 1216-23 & authorities cited. As the Court noted, "[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns." 453 U.S. at 679, 101 S.Ct. at 2986 (citing United States v. Pink, 315 U.S. 203, 225, 62 S.Ct. 552, 563, 86 L.Ed. 796 (1942)). While individuals may have legitimate claims against foreign nations, and may have recourse to some self-help remedies, the presence of these claims and the claimants' attempts to collect may seriously harm the relations between the two countries. The power of the sovereign to alleviate this point of friction and reestablish amiable relations between the two countries is

consistent with "established international practice reflecting traditional international theory." Dames & Moore, 453 U.S. at 679, 101 S.Ct. at 2986 (quoting L. Henkin at 262).

[8] Our Presidents have exercised the power to settle international claims of U.S. nationals at least since 1799. Dames & Moore, 453 U.S. at 679 n. 8, 101 S.Ct. at 2986 n. 8. In the century between 1817 and 1917, for example, there were no fewer than 80 such agreements. Id. (citing W. McClure, International Executive Agreements 53 (1941) and 14 Whiteman, Digest 247). 13/ There is no doubt that the President's power to settle international claims and to eliminate these "sources of friction" is an integral aspect of his authority to conduct the foreign relations of the

United States. As Chief Judge Learned Hand succinctly noted:

> [t]he continued mutual amity between the national and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.

Ozanic v. United States, 188 F.2d 228, 231 (2d Cir.1951).

Every U.S. national who trades in foreign commerce or who travels abroad is a potential beneficiary of the President's authority to settle claims. When tensions arise between our nation and another, those caught in the middle must rely upon the President to safeguard their lives and property to the greatest extent possible. This may mean that

others who have claims against the foreign sovereign may be blocked from seeking to collect their debts so that international tensions will not be exacerbated. Yet, in times of emergency, it is frequently entirely fortuitous who will benefit and who will suffer from any such presidential action. The possibility that the President will intervene in this manner is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. 14/

The rights of nationals trading or traveling abroad are bound up in another, perhaps more fundamental, aspect of a nation's foreign relations. It is the existence of cordial relations between nations that makes trade possible. Channels of commerce and travel that are

free from danger and coercion are as crucial to international trade as to domestic trade. Achieving such safety is, however, much more difficult internationally with multitudinous states and factions claiming sovereignty over sometimes overlapping portions of the globe. Americans who trade or travel abroad rely upon the fabric of relationships established between our government and others as the foundation for all rights and privileges that make their enterprises possible. When that fabric is strained or torn, placing some individual interests in jeopardy, it may not be possible to repair it without sacrificing some pre-existing rights. Yet, if that fabric is not repaired, such rights would be lost in any case.

The circumstances here illustrate this

point. For well over 20 years after the PRC seized its plant, plaintiff did absolutely nothing to obtain compensation. The reason for this was simple and clearly stated by plaintiff's counsel: "There was no opening to China. There was no communication. There was nothing we felt we could do in those years." Transcript of Proceedings, Sept. 29, 1983, at 16. It was only the normalization of relations with the PRC, and the consequential resumption of communication and commerce between the two countries, that held out hope for plaintiff to receive any satisfaction of its claim. Yet, settlement of outstanding claims against the PRC was a sine qua non of normalized relations between the two countries. Had the President refused to settle these claims at less than 100 cents on the dollar,

there might well have been no normalization and plaintiff would have continued to be without remedy at all, as it had been for the preceding 29 years.

[9] In this light, plaintiff's argument that the President sacrificed its claim to obtain normalization with the PRC could well be stood on its head: Without normalization, plaintiff's claim would have remained unsatisfied as it had been for almost three decades. Rather than an unexpected loss, therefore, the compromise settlement obtained by the President could be characterized as a windfall gain. 15/ The truth no doubt lies somewhere in between: With appropriate regard for the interests of the nation as a whole (including those of plaintiff and the other claimants), the President normalized relations with the

PRC. Neither normalization or relations nor satisfaction of plaintiff's claim would have been possible without he other. The President, in the exercise of his constitutional prerogative, struck the bargain he determined would be accommodate all relevant intersts. This is a classical adjustment of "the benefits and burdens of economic life to promote the common good." Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659 16/

The compromise of plaintiff's claim is not a drastic and unexpected interference with its investment-backed expectations that offends traditional concepts of justice and fair play. As noted earlier, the President's power to espouse and settle claims of our nationals against foreign governments is of ancient origin and constitutes a well established aspect

of international law. Plaintiff cannot claim to be surprised by its exercise. Plaintiff did business on foreign soil in an area of the world where the potential for expropriation existed. The possibility that our government would have to intervene to protect American interests in such circumstances was clearly present. Plaintiff had sufficient opportunity to consider these risks in deciding to locate its power plant in Shanghai and the profits it derived during the 17 years of operation should have reflected these considerations.

The concept that the government might step in and discharge debts and otherwise compromise the rights of creditors is hardly novel even in the domestic context. For example, under certain

circumstances a debtor may file for bankruptcy and thereby force an orderly distribution of assets and a discharge of its liabilities. The filing of such a petition has a profound effect upon the rights of creditors. Payments made and liens obtained within a specified time before filing can be set aside or recovered as preferences; the right to pursue self-help remedies is abrogated; debts are discharged with the creditor generally allotted a small fraction of the amount due and sometimes nothing. See 11 U.S.C. Sections 547, 362(a)(3), 727, 1141, 1328 (Supp. V 1981).

Bankruptcy proceedings are an attempt by our government to deal with the unpleasant reality that debtors sometimes are unable to meet their obligations. Congress has determined that an orderly

liquidation of liabilities serves the interests of commercial stability better than piecemeal dismemberment of a debtor's assets. Report of the Commission on the Bankruptcy Laws of the U.S., H.R.Doc. No. 137, 93d Cong., 1st Sess. 71 (1973), reprinted in Collier On Bankruptcy, app. 2, pt. 1, at 71 (1983). Also, there is a strong policy in favor of giving a debtor a second chance so that he will not be oppressed by debts he may never be able to discharge in full. See Williams v. United States Fidelity & Graranty Col, 236 U.S. 549, 554-55, S.Ct. 289, 290-91, 59 L.Ed. 713(1915).

[10, 11] In light of these important policy considerations, a creditor cannot argue that bankruptcy proceedings are unlawful because he could have collected

more had he been permitted to pursue other remedies. See In re 1030 North Dearborn Building Corp., 9 F.Supp. 972, 974 (E.D.Ill. 1935). Nor will a creditor be allowed to claim a taking because the debt has been discharged even though the debtor may eventually be able to pay off the full amount. The policy of giving debtors a fresh start takes precedence over any hope a creditor may have of satisfying his debt. Of course, when the bankruptcy power is exercised in a wholly novel and unexpected manner, frustrating the legitimate expectations of creditors, it may amount to an unconstitutional taking. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 581-89, 602, 55 S.Ct. 854, 859-63, 869, 70 L.Ed. 1593 (1935); see United States v. Security Industrial Bank, 459 U.S. 70, 73-79, 103 S.Ct. 407, 410-12, 74 L.Ed.2d 235 (1982).

However, once the rules of the game are established so that creditors are able to factor them into their business decisions, there can be no question of a taking. See In re Webber, 674 F.2d 796, 803-04 (9th Cir.), cert. denied, ----- U.S. -----, 103 S.Ct. 567, 74 L.Ed.2d 931 (1982).

There are, of course, significant differences between the discharge of domestic debts under bankruptcy law and the discharge of international debts by action of the President. 17/ Yet, the similarities are striking. Both types of actions respond to the failure of a debtor to meet its obligations. In both situations, the debtor may be relieved of obligations that it could eventually pay; in both cases, self-help remedies that might be advantageous to a particular

creditor are abrogated in favor of a common solution that maximizes the overall good. And, in both situations, bona fide claims of individuals may be discharged to promote public objectives.

Moreover, the President's power to espouse and discharge claims against foreign nations is as integral an aspect of foreign commerce as the bankruptcy system is of domestic commerce. Businessmen derive significant benefits from the existence of these powers and their occasional exercise has a stabilizing effect on domestic and foreign trade respectively. In any event, they are part and parcel of the understanding businessmen share about the realities of the marketplace. The President's power to settle international debts has been exercised repeatedly

throughout our history. See p. 244 supra. Those who trade with foreign governments or who hold property in foreign countries must take it into account just as businessmen must consider the existence of our bankruptcy system in structuring their domestic transactions.

[12] 3. This case presents considerations in addition to those applicable to more traditional taking cases because it implicates the President's power to conduct the foreign relations of the United States. As the Supreme Court has noted, "[t]hat there are differences between [the power to conduct foreign affairs and domestic affairs] and that these differences are fundamental, may not be doubted." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315, 57 S.Ct. 216, 218, 81

L.Ed. 255 (1936). The differences arise from the fact that in foreign affairs "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." Id. at 319, 57 S.Ct. at 230. The legislative and judicial branches of government must exercise their powers so as not to interfere with the President's conduct of foreign relations. See Ex parte Peru, 318 U.S. 578, 586-88, 63 S.Ct. 793, 798-99, 87 L.Ed. 1014 (1943); Mackenzie v. Hare, 239 U.S. 299, 311, 36 S.Ct. 106, 108, 60 L.Ed. 297 (1915). 18/

Plaintiff's argument that the President sacrificed its claim against a foreign sovereign in order to promote our national interests could be raised by anyone whose claim has been settled at

less than 100% of what he thinks it was worth. And in every case there would no doubt be significant evidence pointing to some such ulterior motive. A settlement agreement between two nations, even one that on its face deals with nothing else, 19/ does not take place in a vacuum; it is part of the continuing and evolving diplomatic relations between the sovereigns. An amicable resolution of differences may ease overall tensions, facilitating the achievement of other goals. In reviewing the delicate balance sheet of our diplomatic relations, it is always possible to argue that the President might have gained some advantage for the nation by failing to press an individual claim with as much vigor as the claimant might have wished. 20/

[13, 14] A judicial inquiry into whether the President could have extracted a more generous settlement from another country would seriously interfere with his ability to carry on diplomatic relations. As the Supreme Court has recognized, secrecy lies at the very heart of the President's ability to conduct foreign relations. Curtiss-Wright, 299 U.S. at 320, 57 S.Ct. at 221. This principle was established by our first President when he refused a congressional request for information pertaining to the negotiations of the Jay Treaty of 1794. In words that are as timely today as when they were first written, President Washington responded as follows:

> The nature of foreign negotiations requires caution, and their success must often

> depend on secrecy; and even where brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

President's Message to the House of Representatives, March 30, 1976, reprinted in Messages & Papers of the Presidents 1789-1897, at 194-95 (J. Richardson ed. 1897).

[15] Recognition of a cause of action for a fifth amendment taking on the the basis of the President's settlement of a private claim would implicate many of these concerns. Any party dissatisfied

with the settlement of its claim by the President would then seek to probe into the thought processes of our negotiators, perhaps even of the President, to establish what they had in mind when they struck the deal. At issue in such a lawsuit would be the entire spectrum of dealings between our country and another to determine whether a concession in the settlement agreement resulted in some collateral benefit to the United States. It is difficult to imagine a less appropriate or more intrusive exercise of judicial power.

Acknowledging this difficulty, plaintiff suggests that the court limit its inquiry entirely to facts disclosed on the public record. This suggestion is entirely unworkable. The public record, particularly concerning diplomatic

negotiations, is inherently incomplete and frequently misleading. As Mr. Justice Frankfurter has noted, documents embodying settlements between nations "must be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy." United States v. Pink, 315 U.S. 203, 241, 62 S.Ct. 552, 570, 86 L.Ed. 796 (1942) (Frankfurter, Jr., concurring). In preparing such settlement agreements, the draftsman "must save sensiblities and avoid the explicitness on which diplomatic negotiations so easily founder." Id. The same is true of public statements made by our negotiators and the President in connection with such agreements. These expressions must be calculated "to settle both money claims

and to soothe feelings." Id. at 242, 62 S.Ct. at 571.

The public record accompanying the settlement thus is not merely evidence of what transpired, it is part and parcel of that process. The settlement document and the public statements surrounding it are calculated to take into account the political realities here and abroad; they may or may not paint a complete or accurate picture of what transpired at the negotiating table. 21/ To rely only upon such public statements to divine the intentions and understandings of the parties could lead to an entirely erroneous or distored conclusion.

[16] The Supreme Court has noted that not all matters touching upon the foreign relations of the United States are off limits to judicial scrutiny. Rather,

each problem must be assessed "in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture of the specific case, and of the possible consequences of judicial action." Baker v. Carr, 369, U.S. 186, 211-12, 82 S.Ct. 691, 706-07, 7 L.Ed.2d 663 (1962). As the above analysis suggests, each of these factors strongly militates against recognition of the cause of action proposed by plaintiff.

CONCLUSION

Plaintiff cannot state a claim for the taking of its property by the United States. 22/ Its motion for summary judgment is therefore denied; defendant's motion is granted.

The clerk is directed to dismiss the

petition with costs to the prevailing party. 28 U.S.C. Section 2412(a) (Supp. V 1981); RUSCC 54(d).

1/ Indeed, in the view of the United States, the legality of a taking by a foreign government hinges on whether compensation is provided. Hull Note, quoted in 3 G. Hackworth at 662; United States Note to Rumania (Sept. 7, 1948), reprinted in 19 U.S. Dep't of State Bull. 408 (1948) (expropriation that does not provide for equitable valuation and prompt, adequate and effective compensation is not recognized).

2/ Plaintiff suggests that the PRC acquiesced in the validity and continued effect of the agreement, rendering the relationship commercial in nature. See National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. 622, 641-42 (S.D.N.Y.1978), aff'd, 597 F.2d 314 (2d Cir.1979) (contractual relationship with government is commercial despite public purpose of transaction). Moreover, the license agreement contained an arbitration clause that, plaintiff argues, implicitly waives sovereign immunity for purposes of the FSIA. See 28 U.S.C. Sec. 1605(a)(1) (1976); H.R.Rep. No.1487,94th Cong., 2d Sess. 18 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6617 (agreement to arbitrate abroad may constitute implicit waiver of sovereign immunity) (hereinafter cited as H. R. Rep. No. 1487). The legislative history of the FSIA specifically refers to agreements to arbitrate as implicit waivers of sovereign immunity that would justify assertion of jurisdiction by a U. S. court. H.R.Rep. No. 1487, at 18, 1976 U. S. Code Cong. & Ad. News 6617.

3/ It should be noted that not all nations have recognized this principle. See n. 15 infra. Our government has, however, been among the strongest proponents of the view that the right to full and fair compensation exists and must be respected by other nations. It would be inappropriate for this court to adopt a contrary position.

4/ The existence of jurisdiction under the FSIA might well be relevant in determining the value of plaintiff's interest.

5/ E.g., United States vs. Causby, 328 U. S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946)(overflights directly above plaintiff's land); United States v. Cress, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917) (repeated flooding of land); King vs. United States, 427 F.2d 767, 192 Ct.Cl. 548 (1970) (intermittent but permanent and substantial flooding of land).

6/ E.g., Agins v. City of Tiburon, 447 U.S.255 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (zoning ordinance); Mosca v. United States, 417 F.2d 1382, 189 Ct.Cl.283 (1969) (denial of application for registration of fungicide), cert. denied. 399 U.S. 911, 90 S.Ct. 2197, 26 L.Ed.2d 565 (1970).

7/ "[T]he denial of one traditional property right does not always amount to a taking...[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle

is not a taking, because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 U. S. 51, 65-66, 100 S.Ct. 318, 326-327, 62 L.Ed.2d 210 (1979). Restrictions on the use of property that have greatly diminished its value have not amounted to takings if significant value was left to the property owner. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 A.Xr. 114, 71 L.Ed. 303 (1926) (75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (92.5% diminution in value). See also Agins v. City of Tiburon, 447 U.S. 255, 262-63, 100 S.Ct. 2138, 2141-43, 65 L.Ed.2d 106 (1980) (plaintiff who had intended to use land for multiple unit construction limited to five single family dwellings); Jentgen v. United States, 657 F.2d 1210, 1212-13, 228 Ct.Cl. 527, 533-34 (1981), cert. 9)rdenied, 455 U.S. 1017, 102 S.Ct. 1711, 72 L.Ed.2d 134 (1982) (plaintiff who sought to develop 80 acres limited to 20 acres).

8/ Agins, 447 U.S. at 262, 100 S.Ct. at 2142; Penn Central, 438 U.S. at 134-35, 98 S.Ct. at 2664-65; Deltona Corp., 657 F.2d at 1190, 228 Ct.Cl. at 489.

9/ Courts have permitted the complete destruction or grave impairment of property rights where the governmental interest in question was sufficiently strong. See, e.g., National Board of Young Men's Christian Associations v. United States, 395 U.S. 85, 89 S.Ct. 1511, 23 L.Ed.2d 117 (1969) (damage to

buildings caused by efforts to quell rioting); Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (destruction of cedar trees to prevent infection of apple orchards); Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (prohibition against continued operation of brickyard).

10/ See Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 594-95, 55 S.Ct. 854, 865-66, 79 L.Ed. 1593 (1935).

11/ Penn Central, 438 U.S. at 137, 98 S.Ct. at 2666; Kuehner v. Irving Trust Co., 299 U.S. 445, 452-53, 57 S.Ct. 298, 301-02, 81 L.Ed. 340 (1937).

12/ Espousal is not generally appropriate unless "the American national has exhausted such local remedies as may be open to him and has sustained a denial of justice as that term is understood in international law." Letter from Attorney Adviser Matre, Office of the Assistant to the Legal Adviser for International Claims, to Hershel Davis (May 14, 1956), quoted in 8 Whiteman, Digest 907. Denial of justice is a complex concept in international law and can be summarized only imperfectly as follows:

> Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of

judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

Responsibility of States for Damage Done to Foreigners, 23 Am.J. Int'l L., Apr. 1929, at 173 (special Supp.). See generally Restatement Section 165 & comment c. Thus for example, the United States determined that espousal of claims of U.S. citizens against Hungary was warranted in 1950 because "present conditions in Hungary make it impossible in a practical sense for an American citizen to exercise local remedies under Hungarian laws and before Hungarian courts." United States Note to Hungary (Mar. 3, 1950), reprinted in 22 U.S. Dep't. of State Bull. 399 (1950). This conclusion was based, inter alia, on the fact that U.S. citizens "cannot freely obtain the services of a Hungarian attorney of (their) choice effectively to assert (their) rights." Id.

13/ For a description of the United States' modern practice in settling international claims see Brief for the United States as amicus curiae at 30-32, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). reprinted in 2 I.L.M 1009, 1019

(1963).

14/ This concept is inherent in the nature of diplomatic espousal: A government's right to assert the claim of its nationals is premised upon the doctrine that injuries to a country's nationals are injuries to the country itself. See, e.g., Frelinghuysen v. Key, 110 U.S. 63, 71-72, 3 S.Ct. 462, 466-468, 28 L.Ed. 71 (1884). While this doctrine has been subject to criticism, Jessup, Responsibility of States for Injuries to Individuals, 46 Colum.L.Rev. 903, 923-24 (1946), there is much wisdom behind it. An injury to a country's nationals can be an injury to the country itself because it will generally implicate rights and interests of persons other than those directly affected.

15/ There is serious doubt whether plaintiff had any possibility of securing compensation from the PRC without the intervention of our government. While the principle of just compensation for expropriations is one that our government strongly supports, this view is not necessarily shared by Communist and Third World countries. The Supreme Court has recognized this point:

> Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly

> independent and under-developed countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.

Banco Nacional de Duba v. Sabbatino, 376 U.S. 398, 429-30, 84 S.Ct. 923, 940-41, 11 L.Ed.2d 804 (1964) (emphasis added). For an excellent survey of the divergent views as to the responsibility of states to provide just compensation for nationalizations see Brief for Petitioner at 34-38, 45-51, Sabbatino, supra, reprinted in 2 I.L.M. 1149, 1149-50, 1152-53 (1963).

16/ The President's action resulted in both direct and incidental benefits to plaintiff. Directly, the settlement provided plaintiff with some compensation for its claim, thus substituting a smaller certain sum for a larger contingent one. See Kuehner v. Irving Trust Co., 299 U.S. at 453, 57 S.Ct. at 302. Moreover, even if one were to assume that plaintiff could have recovered the full $144 million it claims from the PRC without significant expenditures, the diminution in value to $20 million reduces the claim by only about 85%. In

appropropriate circumstances, diminutions in value in that amount or greater have been held not to amount to a taking. See p. 242-43 & nn. 7 & 9 supra. In addition, like all other persons in the United States, plaintiff is an incidental beneficiary of normalization because it may now engage in profitable trade with the PRC and take advantage of goods imported from the PRC by others. Plaintiff also shares with other U.S. nationals the benefit of enhanced security that presumably resulted from normalization of relations.

17/ That the bankruptcy system is established by statute is not a material difference because the President's power to espouse and settle claims has the approval of Congress and therefore the force of law. Dames & Moore, 453 U.S. at 680-82, 101 S.Ct. at 2987-88.

18/ Early in our history the principle was established that constitutional limitations on the President's authority to conduct foreign relations must be policed largely by the President himself lest our security be impaired:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation

> may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

Senate Committee on Foreign Relations, Report, 14th Cong., 1st Sess. (Feb. 15, 1816), reprinted in Senate Committee on Foreign Relations, Compilation of Reports, 8 S.Rep. No. 231, 56th Cong., 2d Sess. 24 (1901) (emphasis added).

19/ E.g., Agréement on the Settlement of Certain Outstanding Claims and Financial Issues, Jan. 29, 1982, United States-Czechoslovakia, reprinted in 21 I.L.M. 371 (1982).

20/ A State Department memorandum by a noted Assistant Legal Adviser explains the inherent tension between the interests of individual claimants and those of the United States:

The tendency of individual claimants to press unsound claims--for any loss sustained in a foreign country--and in grossly exaggerated form is well-known. Good faith among States requires that a State in espousing a claim against another State must be permitted to determine and press only claims, or that part of a claim, the soundness of which it is convinced, and to press it in terms of its own estimate of the amount of reparation due or reasonably to be received....For a State to press unsound claims, either as to substance or as to amount of reparation or damage, against foreign States may well result in jeopardizing sound and reasonable claims of other individual claimants in the same or other categories of claims existing at the same time or in the future. An espousing State cannot afford to have its good name, its honor compromised by espousing unsound and perhaps dishonest claims which its nationals or

their lawyers may seek to have presented against foreign States.]

Whiteman, Comments on Report on "International Responsibility" by Dr. Garcia-Amador 59-61 (Dec. 18, 1956) (unpublished memorandum), quoted in 8 Whiteman, Digest 1223 (emphasis added). Claimants may well disagree with our government's assessment that their claim is unsound or excessive. Nevertheless, it is the ultimate responsibility of the President, in safeguarding relations with foreign nations to consider such claims skeptically and press only those that can properly be presented in light of all the circumstances. See Frelinghutsen v. Key, 110 U.S. at 75-76, 3 S.Ct. at 469-470.

21/ This case illustrates the point. Plaintiff argues that the public record unequivocally and overwhelmingly demonstrates a sacrifice of its claim against the PRC in order to achieve normalization. Defendant disputes this, suggesting that the statements cited by plaintiff can be interpreted quite differently. Plaintiff's Motion for Summary Judgment at 9-10, 22-23; Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 36-38.

22/ Because of the significant factual differences between this case and E-Systems v. United States, 2 Cl. Ct. 271 (1983) (MILLER, J.), it is unclear whether the two cases reach inconsistent results. Insofar as the approach taken

in E-Systems would lead to a different result in this case, I respectfully note my disagreement.

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
Washington, D.C. 20579

October 29, 1979

Honorable Sam Nunn
United States Senate
Washington, D.C. 20510

Re: Claim No. CN-0556
Decision No. CN-0500
Estate of Harry A. Lucker
(Deceased)

Dear Senator Nunn:

This is in reply to your inquiry of October 22, 1979, on behalf of Mr. Harry A. Lucker, 4656 Rowland Avenue, Columbus, Georgia, regarding the recently concluded claims settlement agreement with the People's Republic of China and the referenced claim filed by his late father's estate during the China Claims Program.

The Commission was authorized to administer the China Claims Program under the provisions of Title V of the International Claims Settlement Act of 1949 [Public Law 89-780, approved on November 6, 1966, 80 Stat. 1365, 22 U.S.C.A. Section 1643]. This program resulted in certified losses in the total principal amount of $196.9 million.

By the above-referenced decision in this claim, entered as a Final Decision on August 20, 1970, the Commission certified losses in the principal amount of $70,000.00 with interest thereon at the rate of 6% per annum from the date of loss to the date of a claims settlement agreement. On September 19, 1979, the Commission issued an Order substituting Harry A. Lucker, Jr., as the

successor-in-interest to 20% of that amount, being $17,500.00. Copies of the decision and Order are enclosed for your information.

On May 11, 1979, a claims settlement agreement was formally signed by the Governments of the United States and the People's Republic of China. This agreement provides that the People's Republic of China will pay $80.5 million to the United States in installments. The first payment of $30 million was received from the Government of the People's Republic of China on October 1, 1979, and the remaining $50.5 is to be paid in five annual installments of $10.1 million beginning October 1, 1980. These funds will be placed in a China Claims Fund out of which payments will be made on losses certified.

Payments from the China Claims Fund will be made in accordance with the method specified under Title I of the International Claims Settlement Act of 1949. The principal amounts of all awards of $1,000 or less will be paid in full. On awards that exceed $1,000 in principal amounts, the first payment will be $1,000.00, and the amounts in excess of $1,000.00 will be paid on a prorata basis as funds are received into the China Claims Fund. This is the same basic procedure specified in all programs administered under the International Claims Settlement Act. There will not be enough money to pay the total principal amount of the losses certified, which totaled $196.9 million, from the fund to be created of the $80.5 million in payments from the People's Republic of

China. Therefore, the statute provides that there cannot be any payments on account of interest.

This Commission was not responsible for nor involved in the negotiations which resulted in the claims settlement agreement with China. However, I would like to point out that the provisions of the agreement compare very favorably with claims settlement agreements concluded with the Eastern European countries against which the Commission has adjudicated claims. If Mr. Lucker has any further questions regarding the claims settlement agreement, he might wish to contact Robert Mundheim, General Counsel, Department of the Treasury, Washington, DC 20220, as that agency concluded the negotiations of the agreement with the Government of the

People's Republic of China.

If Mr. Lucker has any further questions regarding payments on this claim, he should direct them to the Bureau of Governmental Financial Operations, Claims Review and Settlement Branch, Department of the Treasury, Room 340, Treasury Annex, No. 1, Washington, DC 20226, as that office is responsible for making payments from the China Claims Fund.

The Commission appreciates your interest and is pleased to provide the above report to you.

Sincerely,

/s/Richard W. Yarborough
Chairman

Enclosures

PUBLICITY AND NOTICE OF THE PROGRAM

Following the appropriation of funds by Congress on November 8, 1967, for the administration of the China Claims Program, the Commission published notice of the filing period for the program in the Federal Register, as the statute required. The filing period was from January 6, 1968, to July 6, 1969. Additionally, in order to further the fact finding purpose of the legislation, the Commission undertook to widely disseminate information about the program through press releases and notices to persons known to the Commission to possibly have claims for loss of property in mainland China.

The Chairman of the Commission at that time issued a press release on December

27, 1967, announcing the filing period of the China claims Program. That press release was mailed to all members of Congress, 821 trade associations, 37 foreign news media entities, 813 domestic news media entities, and 1,300 entities on a Chinese-American mailing list. A subsequent press release issued on January 25, 1969, reminded potential China claimants of the impending final filing date of July 6, 1969. The authorization of a China Claims Program and its commencement in the near future had previously been mentioned in press releases issued by the Commission on April 17, 1967, and June 9, 1967. Further, in March of 1967, the Commission mailed notices of the program to approximately 3,350 possible claimants, including 2,440 individuals, who appeared

on a list compiled on March 1, 1967, from the following five sources which indicated ownership of property in mainland China by U. S. nationals at the time of or during the decade prior to the ascension to power by the present Chinese Government: (1) China Trade Act Corporations; (2)TFR-500 Treasury Form, tabulation of foreign assets in 1943; (3) War Claims Commission (WCC) Form 801, loss or damage to property during world War II; (4) General War claims filed under Public Law 87-846; and (5) correspondence received by the State Department and the Commission which noted an interest in asserting a claim.

CLAIMS SETTLEMENT AGREEMENT

On May 11, 1979, a claims settlement agreement was formally signed by the

Governments of the United States and China. The agreement settles all claims of nationals of the United States against the Government of the People's Republic of China for losses of property which occurred between October 1, 1949, and May 11, 1979. This agreement provides that the People's Republic of China will pay $80.5 million to the United States in installments. The first payment of $30 million is scheduled for October 1, 1979, and the remaining $50.5 million is to be paid in five annual installments of $10.1 million beginning October 1, 1980. These funds will be placed in a China Claims Fund out of which payments will be made on losses certified by the Commission.

During the first China Claims Program that the Commission completed on July 6, 1972, the claims were adjudicated of

nationals of the United States against the Government of the People's Republic of China for losses of property which occurred between October 1, 1949, and November 6, 1966, the date of approval of that program. Any claims that may have arisen between November 6, 1966, and May 11, 1979, remain to be adjudicated. Therefore, on June 1, 1979, the Commission commenced the administration of a brief new China Claims Program in which the Commission will consider only claims of U. S. nationals for losses in China arising between November 6, 1966, and May 11, 1979, the date of the claims settlement agreement. This program is being conducted under authority granted in Title I of the International Claims Settlement Act of 1949, as amended.

The official filing period for this

program which began on June 1, 1979, and ends on August 31, 1979, was announced by notice published in the Federal Register on June 1, 1979. Additionally, a press release issued on May 30, 1979, announcing the new China Claims Program was mailed to 251 news services. The Commission, also, mailed notices of the program to 256 potential claimants who had expressed an interest in filing claims against the People's Republic of China after the first China Claims Program was completed in 1972.

In order to receive favorable consideration by the Commission, the claims must be for losses resulting from nationalization, expropriation, or other official taking by the Government of the People's Republic of China, which occurred on or after November 6, 1966,

and on or before May 11, 1979. Additionally, the property claimed to have been lost must have been owned by a U. S. national at the time of the loss.

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
Washington, D.C. 20579

SUMMARY OF THE CHINA CLAIMS PROGRAM

Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110], as amended by Public Law 89-780 [80 Stat. 1365], approved November 6, 1966, authorized the Foreign Claims Settlement Commission of the United States to determine, in accordance with applicable substantive law, including international law, the amount and validity of claims of nationals of the United States against the People's Republic of China for (1) losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against,

property of United States nationals and (2) disability and death resulting from actions taken by or under the authority of the Government of the People's Republic of China. Such claims must have risen between October 1, 1949, and November 6, 1966.

The purpose of the China Claims Program was to obtain information concerning the total amount of claims against the People's Republic of China. The statute did not provide for the payment of certifications of losses made by the Commission; rather, it provided for a presettlement adjudication of claims which might assist he United States Government in the negotiation of an agreement in the future.

This program commenced on November 8,

1967, when appropriations for administering the statute were made available. The deadline for filing such claims was July 6, 1969, and the program was completed on July 6, 1972, as provided by the statute.

The Commission received a total of 579 claims of which 3 were withdrawn prior to adjudication. The Commission adjudicated a total of 576 claims, rendering favorable decisions in 378 claims resulting in certified losses in the total principal amount of $196,861,841 (in rounded figures) with interest at the rate of 6% per annum from the date of loss to the date when the claims were settled by an agreement with the Government of the People's Republic of China. The Commission wholly denied 198 claims. Tables are attached which

summarize the program completed on July 6, 1972.

NOTE: Some of the statistics in this Summary differ slightly from those reported in the Annual Report of the Commission for 1972, following a subsequent review of the final figures.

CHINA CLAIMS PROGRAM
CERTIFICATIONS OF LOSS
BY
TYPES OF CLAIMANTS

Claimant Type	No. of Claims	Total Principal Amt.
Religious & Non-Profit	34	$ 58,266,394
Other Business Entity	6	1,394,170
Corporations	42	122,743,554
Individuals	296	14,457,723
Total	378	$ 196,861,841

TYPES OF LOSS

Land	$ 7,519,380
Building/Equipment	15,924,807
Improved Property	36,927,167
Personal Property	11,290,231
Securities/Investments	1,638,105
Debts/Mortgages	182,696
Corporate Assets	122,743,554
Bank Accounts/Cash	95,862
Merchandise	540,039
	$ 196,861,841

CHINA CLAIMS PROGRAM
ANALYSIS OF LOSSES CERTIFIED

Principal Amts of Losses	Individual	Business	Non-Profit Religious	Number
$1,000 or less	35	0	2	37
1,001-2,500	37	1	1	39
2,501-5,000	59	0	0	59
5,001-10,000	35	2	0	37
10,001-50,000	56	14	5	75
50,001-100,000	26	4	4	34
100,001-500,000	32	13	9	54
500,001-1,000,000	15*	6	3	24*
1,000,001-5,000,000	1	4	7	12
5,000,001-10,000,000	0	0	2	2
10,000,001-50,000,000	0	3	1	4
Over 50,000,000	0	1	0	1
Total	296	48	34	378

*One certified loss in this category represents thirteen claims that are consolidated in one amount.

CHINA CLAIMS PROGRAM
CERTIFIED LOSSES OVER ONE MILLION DOLLARS

Claimant	Amt. Certified
Business Corporations	
1. Shanghai Power Company	$53,832,885
2. Esso Standard	27,026,602
3. Caltex Limited	15,443,700
4. IT&T Corporation	7,765,315
5. General Electric Company	4,546,200
6. International Standard Electric Corp.	3,228,853
7. Western District Power Co. Shanghai	1,758,685
8. First National City Bank	1,562,145
9. Shanghai Wharf & Warehouse Co.	1,042,862
Non-Profit/Religious	
1. United Board Christian Higher Education	$23,245,557
2. China Medical Board, N.Y., Inc.	9,368,287
3. Lingnan University Trustee	5,700,000
4. Congregation Mission St. Vincent De Paul	3,124,910
5. Society Congregation Mission, St. Louis, Missouri	3,053,900
6. American Baptist Foreign Mission Society	2,452,947
7. Young Mens Christian Association	2,250,419
8. Presbyterian Church, U.S. Board World Mission	1,711,668
9. Yale-In-China Assoc., Inc.	1,363,683
10. Sisters of Charity, St. Joseph's	1,335,838
Individuals	
1. Shahmoon, Solomon E. & Hannah S.	$ 1,675,655

CHINA CLAIMS PROGRAM
CERTIFICATIONS OF LOSS
TWENTY HIGHEST

Claimant	Principal Amount
1. Shanghai Power Company	$53,832,885
2. Esso Standard	$27,026,602
3. United Board Christian Higher Education	23,245,557
4. Caltex (Asia) Limited	15,443,700
5. IT&T Corporation	7,765,315
6. China Medical Board, N.Y. Inc.	9,368,287
7. Lingnan University, Trustee	5,700,000
8. General Electric Co.	4,546,200
9. International Standard Electric Corp.	3,228,853
10. Congregation Mission St. Vincent De Paul	3,124,910
11. Society Congregation Mission St. Louis, Missouri	3,053,900
12. American Baptist Foreign Missionary Society	2,452,947
13. Young Mens Christian Association	2,250,419
14. Western District Power Co., Shanghai	1,758,685
15. Presbyterian Church U.S. Board World Mission	1,711,668
16. Shahmoon, Solomon E. & Hannah S.	1,675,655
17. First National City Bank	1,562,145
18. Yale-In-China Assoc., Inc.	1,363,683
19. Sisters of Charity, St. Joseph's	1,335,838
20. Shanghai Wharf & Warehouse Co.	1,042,862

CHINA CLAIMS PROGRAM
ANALYSIS OF CLAIMANTS AND CLAIMS

Type of Claimant	Numbers	
	Claimants	Claims
Individual	572	476
Non-Profit/Religious	44	44
Business, including corps. and other business entity	60	59
Totals	676	579

Decisions

Type of Claimant	Certified	Denied	Withdrawn
Individual	360	211	1
Non-Profit/Religious	34	9	1
Business, including corps. and other business entity	49	10	1

Amounts of Losses

Type of Claimant	Asserted	Certified
Individual	$ 81,068,360	$ 14,457,723
Non-Profit/Religious	77,924,966	58,266,394
Business, including corps. & other business entity	144,530,357	124,137,724
Totals	$303,523,683	$196,861,841